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In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-73

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,

APPELLANTS,

v.

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,

APPELLEES.

AN APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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Appellants Francis X. Bellotti, Attorney General of the Commonwealth of Massachusetts; Garrett Byrne, District Attorney for the County of Suffolk, and the District Attorneys of all other Counties of the Commonwealth, submit

this statement pursuant to Rule 15, Rules of the Supreme Court of the United States, in support of their claim that this Court has jurisdiction on direct appeal, to review the final order of the United States District Court for the District of Massachusetts referred to herein.

Opinion Below

The opinion of the district court is unreported. The opinion and order of the district court are reproduced as an appendix to this statement.

Jurisdiction

The present appeal is from a final order of a three-judge court of the United States District Court for the District of Massachusetts, constituted pursuant to 28 U.S.C. §§ 2281 and 2284 upon the plaintiff's application for a permanent injunction to restrain the enforcement, operation, or execution of a statute of the Commonwealth of Massachusetts. In the court below the plaintiffs-appellees, William Baird, Mary Moe, Parents Aid Society, Inc., and Gerald Zupnick, M.D., sought an injunction and a declaratory judgment pursuant to 28 U.S.C. §§ 1331, 1343(3); 42 U.S.C. § 1983; and 28 U.S.C. § 2201, claiming that the parental consent requirement for an abortion, Mass. Gen. Laws, c. 112 § 12P, unconstitutionally restricts the performance of abortions in violation of the principles set out in *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe* v. *Bolton,* 410 U.S. 179 (1973).

On April 28, 1975, the district court entered its order together with its opinion, declaring that the parental consent requirement of the statute violated the United States Constitution and enjoining the defendants from enforcing the provisions of the statute as it relates to parental consent. On May 9, 1975, the Court entered a substitute order,

nunc pro tunc, correcting a clerical error in the original order. A notice of appeal was filed with the district court on May 16, 1975.

Jurisdiction of this appeal is conferred by 28 U.S.C. § 1253.

The cases believed to sustain the jurisdiction of this Court are: *Anderson* v. *Martin,* 375 U.S. 399 (1964); *Paul* v. *United States*, 371 U.S. 245 (1963); *Roe* v. *Wade, supra.*

Statutes Involved

The Massachusetts statute involved is Massachusetts General Laws, c. 112, § 12P, which provides:

> (1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.
>
> If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient.
>
> (2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R.

Criminal penalties are imposed by Mass. Gen. Laws, c. 112, §§ 12N and 12Q, which provide:

§ 12N: Except in an emergency requiring immediate action no abortion may be performed under sections twelve I or twelve J unless

(1) the written informed consent of the proper person or persons has been delivered to the physician performing the abortion as set forth in section twelve P and

(2) if the abortion is during or after the thirteenth week of pregnancy it is performed in a hospital duly authorized to provide facilities for general surgery.

Except in an emergency requiring immediate action no abortion may be performed under section twelve J unless performed in a hospital duly authorized to provide facilities for obstetrical services.

§ 12Q: Any person who commits an act in violation of sections twelve L or twelve M shall be punished by a fine of not less than five hundred dollars nor more than two thousand dollars, or by imprisonment of not less than three months nor more than five years, or by both said fine and imprisonment. Conduct which violates sections twelve L or twelve M which also violates any other criminal laws of the commonwealth, may be punished either under this section or under such other applicable criminal laws. Any person who willfully violates the provisions of sections twelve N

or twelve O shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars.

The text of the statute is found at page 296 of volume 4 of the Annotated Laws of Massachusetts (The Lawyers Co-operative Publishing Company).

Questions Presented

Is the parental consent provision of Mass. G.L. c. 112, § 12P constitutional?

Are the parents of Mary Moe necessary parties for a just adjudication without whom the complaint should have been dismissed?

Should the district court have appointed a guardian ad litem to protect the interests of the minor plaintiff?

Statement of the Case

On August 2, 1974, the Massachusetts legislature enacted a statute which sought to regulate the performance of abortions within the Commonwealth in accordance with the decisions of this Court in *Roe* v. *Wade,* and *Doe* v. *Bolton.* The pertinent part of the statute prohibited the performance of an abortion upon an unmarried pregnant minor under the age of eighteen[1] without the consent of both parents, except in an emergency requiring immediate action. The physician performing the abortion was made subject to criminal action should he perform an abortion contrary to the requirements of Section 12P. If either one or both of the parents denied their daughter the necessary consent for an abortion, consent could be obtained by order

[1] The term "minors" will hereafter refer to persons less than eighteen years of age.

of the superior court for good cause shown after such hearing as the court deemed necessary. Prior to the effective date of the statute in question, the plaintiffs commenced a class action, seeking a declaratory judgment and a permanent injunction. The plaintiffs are:

1. William Baird, a director and chief counselor of the center operated by Parents Aid Society, also a plaintiff to the present action.

2. Mary Moe I and Mary Moe II both of whom alleged they were prevented by the present statute from obtaining abortions at the Parents Aid Society Abortion Center. They also sued on behalf of all other pregnant unmarried minors.

3. Gerald Zupnick, M.D., the medical director of the Parents Aid Society Abortion Center. He also sued on behalf of his patients, and other physicians similarly situated, and their patients.

4. Parents Aid Society, a not-for-profit corporation organized in Massachusetts, which operates the Parents Aid Society Abortion Clinic.

The defendants are the Attorney General of the Commonwealth of Massachusetts and the District Attorneys of all the counties of the Commonwealth.[2]

The complaint sought temporary, preliminary and permanent injunctive relief prohibiting defendants from enforcing or otherwise implementing the parental consent requirement of Section 12P. In addition, the complaint sought a declaratory judgment that the parental consent requirement violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

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[2] Upon motion of the plaintiffs, all district attorneys of the Commonwealth were included. The original complaint named the District Attorney of Suffolk County as the only party district attorney.

The plaintiffs requests for a temporary restraining order and preliminary injunction were granted by an order of the United States District Judge on October 31, 1974. By virtue of the same order, the plaintiffs request for a three-judge court was granted.

The defendants filed a motion to dismiss and/or for summary judgment arguing that the complaint failed to state a claim upon which relief can be granted; that the court lacked jurisdiction over the subject matter of the complaint; that the plaintiffs failed to join parties under F. R. Civ. P. 19, particularly the parents of the pregnant minor plaintiffs; that the plaintiffs lacked standing; that the plaintiffs action was not ripe for judicial review; and that the district court should abstain. The defendants included a motion for a more definite statement with the motion to dismiss. The motion to dismiss was not separately acted upon by the Court.

On November 19, 1974, Kathleen Roth and other individuals, including Jane Hunerwadel, filed a motion to intervene as defendants on behalf of and as representatives of all parents in the Commonwealth with unmarried minor daughters who are or might become pregnant. The motion to intervene was allowed on November 20, 1974.

At the trial on the merits, Mary Moe, a sixteen year old unmarried minor living with her parents, testified on behalf of "a substantial class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent, and who do not wish to involve their parents." The testimony and all depositions of Mary Moe were impounded by the Court. Additional testimony was presented by experts in the field of psychiatry and medicine.

The intervenor Jane Hunerwadel testified on behalf of the parents of pregnant unmarried minors. Plaintiffs Baird and Zupnick also testified.

Because the orders of the district court restrained the enforcement of the statute prior to their taking effect, there could not be testimony on the extent and scope of the enforcement of Section 12P; nor could there be testimony on the operation and effectiveness of the judicial consent provision of the statute. The sole question that the plaintiffs presented to the three-judge court was whether Section 12P was unconstitutional on its face.

On April 28, 1975, the three-judge court of the United States District Court for the District of Massachusetts issued the order and opinion appended to this statement including the dissent of the senior district judge. The court certified the complaint as a valid class action with Mary Moe, Parents Aid Society, Gerald Zupnick and Intervenor Hunerwadel acting as class representatives. The standing of plaintiff Baird was not passed upon. The defendants contest numerous findings of fact as being unsupported by the evidence. In addition, as more fully set forth in the following section of this statement, the defendants contest the legal conclusions that the district court majority drew from the evidence and from the decisions of this Court.

The Questions Are Substantial

I. Introduction

In essence, the Massachusetts statute under challenge reflects the state's attempt to accommodate the right of a pregnant minor under the Fourteenth Amendment with the rights of parents to play a role in the most difficult judgment affecting the physical and emotional well-being of their minor children. The *Roe* v. *Wade* and *Doe* v. *Bolton* cases did not involve these competing private interests. By contrast the Court is here presented with a statute that

seeks conformity with the prior decisions of the Court and, at the same time, seeks to protect the fundamental interests of both the parents and the child. In footnote 67 of *Roe* v. *Wade, supra* at 165, the Court explicitly left such question for subsequent consideration:

> "Neither in this opinion nor in *Doe* v. *Bolton,* post, p. 179, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are quite aware that some statutes recognize the father under certain circumstances. North Carolina, for example, N. C. Gen. Stat. § 14-45.1 (Supp. 1971), requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age, 41 N. C. A. G. 489 (1971); if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional."

The opinion of the majority of the three judge court in this case refers to, and disagrees with, the case of *Planned Parenthood* v. *Danforth,* Civ. No. 74-416 C(A), — F. Supp. — (E.D. Mo. 1975), enforcement stayed 43 U.S.L.W. 3451. The dissent specifically adopts it. Although the statutes of Massachusetts and Missouri differ in some respects,[3]

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[3] Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

(4) With the written consent of one parent or person in loco parentis if the woman is unmarried and under the age of eighteen years.

Unless the abortion is certified by licensed physician as necessary in order to preserve the life of the Mother. (Missouri House Bill 1211) *Planned Parenthood* v. *Danforth*, supra at 3.

the issue of constitutionality of parental consent provisions are central to both. Should probable jurisdiction in *Planned Parenthood* v. *Danforth, supra,* be noted by the Court, appellants submit that the instant appeal should be considered in conjunction with *Danforth* in order to provide comprehensive review of the issue raised by the statutes under challenge.

II. The Parental or Judicial Consent Provision of Mass. G.L. c. 112, § 12P Does Not Deprive the Minor Plaintiff of Her Constitutional Rights.

The right to have an abortion as delineated by the Court in *Roe* v. *Wade* and *Doe* v. *Bolton* is not unqualified, but at some point is subject to regulation by the state. As the Court stated in *Roe* v. *Wade*:

> "We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." 410 U.S. at 154.
>
> "Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at *some* point the state interests as to protection of health, medical standards, and prenatal life, become dominant." 410 U.S. at 155.

To be sure, regulation must be based upon compelling state interests and structured in such a way as to effectuate only those legitimate state interests. *Roe* v. *Wade* did not

consider the scope of the right to privacy as it applies to persons other than a pregnant adult woman. Appellants recognize that a minor possesses a right to privacy, but submit that right is, as in the adult's case, not absolute or unqualified. Moreover, the Court has long recognized that a state has a special interest in regulation where minors are concerned. And in certain circumstances involving acknowledged fundamental rights, a state has been permitted to regulate a minor's exercise of that right to a greater degree than an adult's exercise of that same right. The Court in *Ginsberg* v. *New York,* 390 U.S. 629, 638 (1968), held that where pornographic material was concerned the state has a broader authority over children's activities than over adults:

> We do not regard New York's regulation in defining obscenity on the basis of its appeal to minors under 17 as involving an invasion of such minors' constitutionally protected freedoms. Rather § 484-h simply adjusts the definition of obscenity "to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests . . ." of such minors. *Mishkin* v. *New York,* 383 U.S. 502, 509; *Bookcase, Inc.* v. *Broderick, supra,* at 75, 218 N.E. 2d, at 671. That the State has power to make that adjustment seems clear, for we have recognized that even where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults. . . . *Prince* v. *Massachusetts,* 321 U.S. 158, 170."

In assessing the constitutionality of the juvenile court system, this court has hesitated to extend the full panoply of procedural due process guarantees to minors accused of criminal acts. Despite the revolutionary decision in *In re*

Gault, 387 U.S. 1 (1967), the Court has never removed the obstruction between adults and children in the state's criminal process. Since the Court's decision in *In re Gault, supra,* and *In re Winship,* 397 U.S. 358 (1970), the Court has emphasized that the constitutional due process rights extended to adults do not necessarily apply to minors in the criminal justice system:

> "The court has refrained, in the cases heretofore decided, from taking the easy way with a flat holding that all rights constitutionally assured for the adult accused are to be imposed upon the state juvenile proceeding. What was done in *Gault* and in *Winship* is aptly described in *Commonwealth* v. *Johnson,* 211 Pa. Super. 62, 74, 234 A.2d 9, 15 (1967):
>
> > 'It is clear to us that the Supreme Court has properly attempted to strike a judicious balance by injecting procedural orderliness into the juvenile court system. It is seeking to reverse the trend [pointed out in *Kent,* 383 U.S. at 556] whereby "the child receives the worst of both worlds . . ." ' ." *McKeiver* v. *Pennsylvania,* 403 U.S. 528 (1971).

Likewise, it may be asserted that in the present appeal, the Court must recognize interests other than the minors which are not present in the adult's decision to abort.

Appellants recognize that the state's need to regulate the affairs of minors cannot be asserted in the abstract, thereby drawing a blanket distinction on the basis of age. Rather, where fundamental rights are in issue, appellants perceive that if the state can establish a narrowly defined basis for regulating the affairs of minors in a more extensive way than adults, this Court will accept that regulation. This limited basis has been accepted in *Ginsberg* v. *New*

York, supra, and *McKeiver* v. *Pennsylvania, supra.* Appellants submit that similarly such a basis exists where the state seeks to assure parental involvement in the decisions of a minor to have an abortion.

Courts have long held that under the common law an unmarried minor lacks the capacity to consent to medical treatment, with certain limited exceptions; Morris and Mority, *Doctor, Patient and the Law* (5th ed. 1971) pp. 161-166. Massachusetts courts have uniformly applied this basic restriction on a minor's independent decision to submit to medical treatment. *Reddington* v. *Clayman,* 334 Mass. 244 (1956). See also *Relf* v. *Weinberger,* — F. Supp. — (D. D.C. 1974).

By requiring parental consent for the performance of an abortion, the Massachusetts legislature codified the long-standing common law in its enactment of G.L. c. 112, § 12P. The district court recognized that the ability of the minor to make a considered decision was different from that of adults. At best, it is a factual matter to be determined on a case-by-case method (App. p. 12). The district court failed to then consider how the common law rule serves as a protection against ill-considered decisions in highly stressful situations by involving the parents, the adults who obviously have the greatest interest in the child's welfare. The rule recognizes that all surgical procedures have emotional and physical after-effects. Here, the nature of the decision to abort includes extraordinary emotional and psychological problems which may be alleviated by parental involvement. In addition, the requirement of parental consents for an abortion, as well as other surgical procedures, protects against possible overreaching by the physician. *Dixon* v. *U. S.,* 197 F. Supp. 798, 803 (D.S.C. 1961)

Although the requirement of parental consent affects the exercise of the minor's right to an abortion, the judicial consent provision guards against unreasonable withholding

of such consent to the detriment of the child. The judicial consent provision of Section 12P, rather than infringing upon the existing rights of minors, provides an additional protection usually absent in the parental consent requirement for other surgical operations. The minor may directly seek review in the courts or physicians or health care facilities may petition the court on the minor's behalf.

In its consideration of the judicial review provision, the district court de-emphasized the role of the state superior court and assumed, inappropriately, that the reviewing court will be a "rubber stamp" for the interests of the parents:

> "Whatever may be accorded to the minor by allowing the judicial review 'for good cause shown', we do not regard it as meaning that the court should reverse a refusal of consent it finds reasonably made in the parent's interest". (App. p. 13)

By phrasing the parent's right to deny consent as an absolute veto power, the district court assumes that the state courts will not properly perform their duties to weigh the interests of both parties. If the minor is capable of making an informed and knowing consent, it is proper to expect, until evidence is presented to the contrary, that state courts will uphold the minor's exercise of her constitutional rights. Any other assumption runs counter to this court's continuous concern that state courts be given the opportunity to consider such issues without federal court intervention. See *Huffman* v. *Pursue, Ltd.*, 43 U.S.L.W. 4379 (March 18, 1975); cf. *Younger* v. *Harris*, 401 U.S. 37 (1971).

Other courts which have held similar parental consent statutes to be unconstitutional were not faced with an automatic provision for judicial review as in Section 12P. In *Washington* v. *Koome*, — Wash. — (January 7, 1975)

the statute "[s]ubjected . . . a minor woman's decision to terminate an unwanted pregnancy to absolute and potential arbitrary parental veto . . . ." The only provision for judicial review involved the possibility of juvenile court intervention in cases of parental caprice when the abortion is necessary to save the mother's life. The judicial review provided by Massachusetts is far more open-ended than the judicial remedy in *Washington* v. *Koome, supra.* Thus, the statute creates an entirely new avenue for judicial review rather than further burdening the minor's rights. See also *Coe* v. *Gerstein*, 376 F. Supp. 695 (S.D. Fl. 1973)

The "informed consent" that the state seeks to insure is not limited to surgical questions and the physical effects of the abortion. Involved here are the emotional and social consequences of a minor's abortion decision. Because of the physical, psychological and social effects on the child, it is imperative that the naturally most concerned adults participate in the decision and insure that the minor is in a supportive family environment prior to, during, and following the operation. *Washington* v. *Koome*, supra.

The state also has a compelling interest in protecting the rights and responsibilities of the parent that inhere in the family relationship. The district court erred in finding that the rights of parent and child involved in the abortion decision were adverse. By rejecting the state's interest in protecting the primacy of the family unit through the participation of the parent, the district court raised a substantial federal question.

The Court has consistently held that the rights of parents to provide guidance and input into important decisions affecting their minor children are protected by the Constitution. *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925). In *Stanley* v. *Georgia*, 405 U.S. 645, 651 (1972), the Court stated:

"The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential', *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923), 'basic civil rights of man', *Spinner* v. *Oklahoma,* 316 U.S. 535, 541 (1942), and 'rights far more precious . . . than property rights', *May* v. *Anderson,* 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder', *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer* v. *Nebraska, supra,* at 399, the Equal Protection Clause of the Fourteenth Amendment, *Spinner* v. *Oklahoma, supra* at 541, and the Ninth Amendment, *Griswold* v. *Connecticut,* 381 U.S. 479, 496 (1965) (Goldberg, J., concurring)."

A state may not unduly interfere with the rights of the parent in the context of the familial relationship, *Wisconsin* v. *Yoder,* 406 U.S. 205, 233 (1972).

In the Court's decisions in *Wade* and *Bolton,* the impact of these substantial interests upon the decision to abort and the individual's right to privacy were not in issue. Not only is the parent-child relationship a sufficient basis for the finding of a compelling state interest, but the relationship is an independent right existing outside the limited interests of the mother's health and the life of the fetus. The fundamental rights of the child must be accommodated with the fundamental interests of the parent within the family context.

The majority below found that:

"All experts agreed that pregnancy in an unmarried minor is a period of great emotional stress; that support is needed, and that parental support if forthcoming is desirable." (App. p. 9)

However, the court did not recognize the compelling interest of the state in protecting the duties and responsibilities of the parents and insuring that the minor female has the desired parental support. The dissent stated:

"Parents have rights and responsibilities that, where in the parent-child relationship, stem from the fact, nature and purpose of parenthood. These rights and responsibilities are not inimical to the minor's rights and welfare. They exist for the benefit of the child and reflect the child's very real need for proper guidance and protection during the child's formative years. The state has a compelling interest in protecting the parental rights and duties against unauthorized intrusion by third persons. The statute under attack expresses this compelling interest." (App. p. 25)

Placing Section 12P in context with other similar Massachusetts statutes makes clear the state's general concern for protecting the child through a strengthening of the family relationship. See Mass. G.L. c. 209, § 32 (duty to support). A contrary result disregards past precedent of this court and raises fundamental and substantial constitutional questions.

III. The Parents of the Minor Plaintiff Should Have Been Joined as Parties Pursuant to F.R.Civ.P. 19.

As the preceding argument indicates and as Section 12P specifically provides, the parents of unmarried pregnant

minors are given the right to deny consent for an abortion. Whether this right existed prior to the enactment of the statute or was created by it, the parents of Mary Moe have a fundamental interest in the outcome of the litigation. The dissent expressed the failure to include the parents as being a violation of Due Process:

> "The decision of the majority deprives the parents of their parental rights without notice or opportunity, to be heard concerning the existence or extent of those rights. These parents have thus been deprived of their parental rights without due process of law. *Roller* v. *Holly,* 176 U.S. 398 (1900); see *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 123 (1968); Federal Rules of Civil Procedure 12(b)(7) 19; Wright & Miller, Federal Practice and Procedure: Civil § 1602 at 20 (1972). A decision entered in violation of the essential requirements of due process of law is void. *Bass* v. *Hoagland,* 172 F.2d 205, 209 (5th Cir.), *cert. denied,* 338 U.S. 816 (1949); *United States* v. *Manos,* 56 F.R.D. 655, 659, (S.D. Ohio, 1972); See *Roller* v. *Holly, supra.*" (App. pp. 20-21)

In addition to depriving interested parties of their constitutional rights, the failure to include Mary Moe's parents deprived the district court of a fair and complete factual presentation of the issues. The interests of the parents are distinct from those of the named defendants and permitting parties with their own stake in the outcome to characterize the parents' interest was wholly inappropriate.

Without direct evidence about the actual disposition of the parents of Mary Moe, the court could not realistically assess the persuasiveness of her testimony about their antipathy. Accepting such assertions further polarizes family relationships. When actually faced with a troubled

child the interests of parent and child may be far more in accord than either can appreciate in the abstract.

IV. A Guardian Ad Litem Should Have Been Appointed Pursuant to F.R.Civ.P. 17(c) To Protect the Interests of the Minor.

At the same time that Mary Moe's parents were excluded from the proceeding below, the court permitted the interests of Mary Moe to be asserted by the attorney for the other named plaintiffs. The district court assumed that there was no conflict among the interests of all the named plaintiffs and rejected the defendants' contention that a guardian ad litem was necessary:

> Defendants contend that the court should have appointed a guardian ad litem for Mary Moe, citing F.R.Civ.P. 17(c). We do not do so. *Fatima Foe* v. *Vanderhoof,* D. Colo. 2/5/75, — F. Supp. —. In connection therewith we make the following findings. Mary Moe is of ample intelligence to, and in fact does, fully understand the nature of this action and has voluntarily participated therein. Her interests in the facial interpretation of and effect of the statute are fully represented by her competent counsel, and to the extent that there may be thought to be any conflicting interests, by the action of competent counsel for the intervening parent. Finally we observe, although we do not make it a basis for our decision, that insofar as we look to state law, *cf. Marshall* v. *Mulrenin,* 1 Cir., 1974, 508 F.2d 39, the statute in question, which offers the minor a superior court hearing if her parents refuse their consent to an abortion, provides that the court need not appoint a guardian although in such instance no one at all may be representing her." (fn. 5, App. p. 3).

Counsel representing Mary Moe also represented plaintiffs Baird, Zupnick, and Parents Aid Society, Inc., all of whom were instrumental in the performance of the abortion and received fees for their services. (See dissenting opinion, App. pp. 22-23). Thus there was no independent counsel exclusively representing the interests of Mary Moe. Since the focus of the majority's opinion was on the minor's right to privacy, it is only proper that the court insure that her rights are protected against possible encroachment by adults other than her parents. Moreover, a guardian was essential to avoid any potential conflict of interests on the part of counsel for the other plaintiffs.

Rule 17(c) of the Federal Rules of Civil Procedure provides:

> "The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such order as it deems proper for the protection of the infant or incompetent person."

The Court of Appeals for the Sixth Circuit has addressed the issue of whether Rule 17(c) applies to an abortion situation.

> "We deem the issue particularly critical in this case, where the legal issues are controversial in nature. The plaintiff is a minor, pregnant out of wedlock, without the benefit of a natural parent or guardian, and where her legal guardian is the defendant in the lawsuit.... Moreover since the respective legal positions of the child and guardian are adverse in this lawsuit, it cannot be said that the plaintiff is 'otherwise represented' in the action as provided in Rule 17(c). While it would not be at all improper for the

> court, upon consideration, to appoint the child's attorney as her guardian ad litem, the mere presence of an attorney representing her in the action is insufficient of itself to protect her personal interests in the action. We stress the obligation of the trial judge to exercise his discretion, bearing in mind the very real need of a 14-year-old plaintiff to have her own personal rights and interests protected". *Noe* v. *True*, 507 F.2d 9, 11-12 (6th Cir. 1974).

The principles articulated by the Sixth Circuit make a compelling argument for the appointment of a guardian, who will provide the fundamental need of protecting the interests of the minor throughout the litigation.

Conclusion

The questions presented by this appeal are substantial and warrant plenary consideration by the Court. Probable jurisdiction should therefore be noted and the case set down for argument.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 74-4992-F

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,

PLAINTIFFS,

v.

FRANCIS BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,

DEFENDANTS,

JANE HUNERWADEL,

DEFENDANT-INTERVENOR.

Before ALDRICH, *Senior Circuit Judge,*
JULIAN, *Senior District Judge*
and FREEDMAN, *District Judge.*

OPINION

April 28, 1975

ALDRICH, *Senior Circuit Judge.* This is an action, brought as a class action, to enjoin, as unconstitutional on its face, the enforcement of a Massachusetts statute, Mass. G.L. c. 112, § 12P, enacted to take effect November 1, 1974, by Mass. Acts 1974, c. 706. The statute makes it a criminal offense to perform an abortion upon a minor without the consent of both parents as well as that of the minor, with certain exceptions, the most important being that the

parents' refusal may be overruled by a superior court judge "for good cause shown." The pertinent paragraph reads as follows:

> "Section 12P(1). If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother."

Standing.

Plaintiffs are William Baird; Mary Moe I, hereinafter Mary Moe;[1] Parents Aid Society, Inc., hereinafter Parents Aid, and Gerald Zupnick. Defendants are Francis Bellotti, Attorney General of the Commonwealth;[2] Garrett Byrne, district attorney for the County of Suffolk, and the district attorneys of all other counties in Massachusetts. Intervening defendants are Kathleen Roth *et al.*, whom we permitted to intervene on behalf of, and as representative of, Massachusetts parents having unmarried minor daughters who are, or who might become,[3] pregnant. No evidence or stipulation was introduced as to any intervenors except Jane Hunerwadel. To be consistent, n. 1, ante, we must dismiss as to all the others. Mrs. Hunerwadel has three minor daughters, one in her teens, none pregnant as far as she knows. Like defendants, she does not know the identity of Mary Moe, and represents her only in the

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[1] Three other Mary Moes were named, but no evidence supporting their standing was introduced, and we dismiss as to them for want of proof.

[2] Replacing Robert Quinn, the incumbent at the time this action was brought.

[3] Plaintiffs object to the latter's standing, citing Mr. and Mrs. Doe in *Roe* v. *Wade*, 1973, 410 U.S. 113, 128. We think the situation distinguishable.

general sense that she may represent parents of all nubile minor females in Massachusetts who may, in their opinion unwisely or improperly, wish to have an abortion without informing them.

Plaintiff Mary Moe is an unmarried minor residing at home with her parents in Massachusetts. At the time of the institution of the action she was 16 years of age and about 8 weeks pregnant.[4] She has not informed her parents of her condition, and does not wish to. Her father had told her, in connection with the pregnancy of a contemporary friend, that if that happened to her he would evict her and kill her boy friend. She did not know how far to believe this, except that she felt certain he would take some physical action against the boy. The boy, also 16, was a three-months acquaintance with whom she is no longer associating. Her relations with and affection for her family are "average good." There was no sexual instruction, no one caring to initiate the subject. There is no religious factor. She knew vaguely about contraception, but had no access to materials, and "didn't care to wait until [she] was 18." Her reasons for not informing her parents were in part apprehension of what might happen to her as a result of their learning she had had intercourse, in part the fear of what would happen to her boy friend, and in part the desire to spare her parents' feelings. She did confide in her older sister. Pregnancy would not have kept her from attending school.[5]

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[4] Mary Moe has since had an abortion, performed by Dr. Zupnick following a restraining order issued in this case suspending the operation of the statute. It is not suggested that this moots the action as to her. *Roe* v. *Wade*, ante, 410 U.S. at 125.

[5] Defendants contend that the court should have appointed a guardian ad litem for Mary Moe, citing F.R.Civ.P. (17c). We do not do so. *Fatima Foe* v. *Vanderhoof*, D.Colo., 2/5/75, ___ F.Supp. ___. In connection therewith we make the following findings. Mary Moe is of ample intelligence to, and in fact does, fully understand the nature of this action and has voluntarily participated therein. Her

In connection with Mary Moe's capacity to represent a plaintiff class, F.R.Civ.P. 23(a)(4), we find, following examination and cross-examination in camera, that she is of average intelligence and awareness; that her emotional age at least corresponds with her chronical age, and that she had made a considered decision, before she learned of her pregnancy, that in case of pregnancy she would seek to abort, and that she was competent to make and effectuate that decision. If relevant, she did not learn of the other plaintiffs until someone else had determined that she was pregnant. We find that she is fairly representative of a substantial class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent, and who do not wish to involve their parents. This, of course, requires standing, but there can be no question of Mary Moe's standing to bring this action. Though the statute does not in terms subject her to criminal liability, its enforcement[6] would prevent her, absent violation by someone, from obtaining an abortion without compliance with its terms. Thus, she exhibits "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues," *Baker* v. *Carr*, 1962, 369 U.S. 186, 204,

interests in the facial interpretation of and effect of the statute are fully represented by her competent counsel, and to the extent that there may be thought to be any conflicting interests, by the action of competent counsel for the intervening parent. Finally, we observe, although we do not make it a basis for our decision, that insofar as we look to state law, *cf. Marshall* v. *Mulrenin*, 1 Cir., 1974, 508 F.2d 39, the statute in question, which offers the minor a superior court hearing if her parents refuse their consent to an abortion, provides that the court need not appoint a guardian although in such instance no one at all may be representing her.

[6] Suit was brought shortly before the effective date of the statute and a restraining order was promptly issued. This order has since been continued without a separate hearing for a preliminary injunction with at least the tacit consent of the defendants, first because of their need for depositions, and thereafter because of scheduling difficulties with respect to their witnesses.

thereby demonstrating "a logical nexus . . . between the status asserted by the litigant and the claim [she] presents ...." *Flast* v. *Cohen*, 392 U.S. 83, 102. *See Roe* v. *Wade*, ante, 410 U.S. at 124, *Abele* v. *Markle*, 2 Cir., 1971, 452 F.2d 1121, 1125.[7]

Plaintiff William Baird is the founder and director of plaintiff Parents Aid. He describes himself as being, among other things, a pioneer and advocate for the free availability of abortions. He has a strong personal interest in that sense, but no financial or other tangible concern. *But cf. Sierra Club* v. *Morton*, 1972, 405 U.S. 727, 738; *Data Processing Service* v. *Camp*, 1970, 397 U.S. 150, 154. Baird claims standing because he wishes to assist Parents Aid, which allegedly, if the statute were in force, would make him an accessory. *See Griswold* v. *Connecticut*, 1965, 381 U.S. 479, 481. Arguably, this is too remote an interest to confer standing. If any citizen who might like to violate a law may contest it, the doctrine of standing would be meaningless. *Cf. Roe* v. *Wade*, ante, 410 U.S. at 128, and cases cited. On the other hand, Baird's contemplated activities are far less speculative than those there found insufficient. As director of Parents Aid, Baird for some time provided minors with abortion counseling and services, and the mere continuation of this activity, the mere preservation of the status quo, would subject him to criminal liability. *Cf. Griswold*, ante, 381 U.S. at 481; *Abele*, ante, 452 F.2d at 1125. In the light of the unassailable standing of other plaintiffs, however, *see* post, we do not pass on the question of Baird's standing.

[7] We do not agree with defendants' insistence that in order to have standing Mary Moe must first exhaust the statutory conditions. *Cf. McNeese* v. *Board of Education*, 1963, 373 U.S. 668, 670-72. By this, apparently, they mean that she should have first informed her parents to seek their consent (and had it refused), one of the very requirements she contests. One does not have to comply with a statute in order to challenge its constitutionality.

Plaintiff Parents Aid is organized as a Massachusetts non-profit corporation. It provides, through its medical director and supporting personnel, abortions for varying fees, depending upon ability to pay. About 15% it performs without charge. The Society's standing is conferred not only by its direct subjection to criminal liability, but also by the recognition that even general enforcement of the statute against physicians alone would seriously interfere with its ongoing activities. *Doe* v. *Bolton*, 1973, 410 U.S. 179, 188; *Truax* v. *Raich*, 1915, 239 U.S. 33, 38-39.

Plaintiff Gerald Zupnick, a resident of New York, is a physician licensed in Massachusetts, and is Parents Aid's medical director. He works regularly at the latter's place of business two days a week, performing abortions on a fee basis. Dr. Zupnick's standing in this action is beyond question. The statute at issue applies directly to his activities, and although Dr. Zupnick was receiving a substantial income from performing these procedures, we credit his testimony that the threat of prosecution would force him to cease.

We find that Mary Moe, Parents Aid Society, Inc., and Gerald Zupnick have standing, as representative party plaintiffs, and Jane Hunerwadel as intervenor. From the standpoint of their being due and adequate class representatives, we find they have a strong personal interest and are competently and vigorously represented by legal counsel, and we certify this as a valid class action as to all.

Before leaving the question of standing we note that Parents Aid and Dr. Zupnick by hypothesis cannot lawfully, with exceptions too unusual for us to be concerned with, perform abortions upon minors incapable of consenting. Nonetheless, we hold that they do have standing to attack the statute as applied to all minors, at least insofar as it requires the consent of both parents. We find nothing about abortions that requires the minor's interest to be

treated differently from other medical and surgical procedures, as to which we find the custom to be to proceed on the consent of one parent.

Controversy.

Defendants contend that there is no "case or controversy" because none of the plaintiffs has been actively, or affirmatively, threatened with criminal proceedings. However, this is not the test. Plaintiffs need not act so as to precipitate their prosecution under a statute they wish to challenge as unconstitutional in order to constitute a case or controversy. Nor must they show that prosecution has been actively or verbally threatened in order to establish that the government's posture is adverse. *See Doe* v. *Bolton,* ante. 410 U.S. at 188. Rather, we must make a realistic appraisal of the total circumstances to determine whether the prospect of enforcement of the statute is "chimerical," *Steffel* v. *Thompson*, 1974, 415 U.S. 452, 459, or "concrete," *Aetna Life Ins. Co.* v. *Haworth*, 1937, 300 U.S. 227, 240. *Cf. Younger* v. *Harris*, 1971, 401 U.S. 37, 42; *Abele,* ante, 452 F.2d at 1125; *Acevedo Montalvo* v. *Hernandez Colon,* D.P.R., 1974, 377 F.Supp. 1332, 1334 (per curiam). We find that the subject of abortions has excited a great amount of feeling in Massachusetts; that the defendants, as is evident from their activities in this case, are satisfied that the statute is constitutional; that there will be extensive pressure upon them to prosecute in case of a violation, and that it is highly improbable that they would not immediately respond to such pressures. Baird testified that he had been arrested without warning in connection with the Massachusetts birth control statute, so-called, and we believe that public opposition to abortion is more organized and more vocal than was the opposition to birth control. Under all the circumstances we find that plaintiffs had every reason to believe that they had only

two alternatives, to continue their current activities and face immediate arrest, or to bring the present suit.

The "controversy" requirement, like the standing requirement, is to assure that there will be a vigorous contest with active participation on both sides by parties immediately interested, as distinguished from parties engaging in theoretical disputes as an intellectual pastime. *See Roe* v. *Wade*, ante, 410 U.S. at 123; *Golden* v. *Zwickler*, 1969, 394 U.S. 103, 108; *Maryland Cas. Co.* v. *Pacific Coal & Oil Co.*, 1941, 312 U.S. 270, 273. It is correspondingly requisite that the court's time not be wasted. We find that the present case fits the requirements in both respects, and hold that there is sufficient controversy.

The Underlying Facts.

We were offered nearly three days of testimony. The principal purpose, as we gather it, was to demonstrate on the one side the need, and on the other the objections; the interests served, and the interests countered, by the statute. In some areas there was considerable disagreement between the experts. We do not propose to resolve those disagreements. Even though in some instances our findings might not correspond with defendants' experts, we may accept their factual evidence for present purposes in cases of conflict because, either way, our ultimate conclusions would be the same. It is to be understood that throughout this opinion, unless the contrary is noted, we are talking about abortions during the first trimester.

There are presently three common methods of performing an abortion; injection of a saline solution; the so-called vacuum method, and a hysterotomy. The first two are performed under local anesthesia. The vacuum procedure, apparently the one generally performed by Dr. Zupnick, requires five to seven minutes. It is followed by minor bleeding and occasional pains, spanning perhaps three to

six weeks. There is a possibility of infection and other complications, as with any procedure, and there is a possibility, minor, or very remote, depending on whose testimony is accepted, of subsequent sterility. Plaintiffs' doctors, who had performed a very substantial number of first trimester abortions, gave a very low percentage of complications or "morbidity" in the case of lawful, as distinguished from illicitly performed abortions. Defendants' doctor's considerably higher figure we attribute to the fact that he does not do abortions as such, but only "terminates pregnancy" when there is already some medical necessity. Even he did not suggest any greater risks for minors than for adults.

In addition to such physiological risks, there are possible emotional risks. Abortion is commonly looked upon as offering "instant relief." In many cases this may be so, but in some it may be followed by various feelings of guilt. We also respect defendants' expert's view that it is undesirable to make too speedy a decision. At the same time we note his opinion that this decision, as the minor reaches the end of the first trimester, has great psychological as well as medical weight, and should be made as soon as possible.

All experts agreed that pregnancy in an unmarried minor is a period of great emotional stress; that support is needed, and that parental support, if forthcoming, is most desirable. Probably most parents are supportive. We are obliged to find, however, that an appreciable number are not, for a variety of reasons. Moreover, as may be the case with Mary Moe's father, parents may seek to control sexual behavior by threats that they do not mean, or would not carry out in the actual eventuality, but which nonetheless serve to destroy intercommunication.

We must find, however, that a significant number of minors who are capable of consenting are unwilling to tell

their parents, either because they correctly fear what would happen to themselves, or, although they would expect support from their parents in one sense, they know their parents would under no circumstances consent to the abortion they wish, or, because of their views on illegitimacy and the stigma attaching to unmarried mothers, would attempt to make them enter into a marriage they do not want.

There are also minors who, understandably, do not wish to have their parents know of their condition because of the distress that it would cause them, and the minor's own consequent feelings. While we shall not deal with this aspect further, we note that in a very real sense it precisely fits standard concepts of the right of privacy.

From the standpoint of parents, we believe that most would wish to know of their daughter's pregnancy, and we may assume that most would seek to be supportive. However, we cannot think that all would be. We accept the testimony of plaintiffs' experienced expert that some parents would insist upon the continuance of the pregnancy simply as a punishment, or to teach a lesson. We might find difficulty in regarding this reaction as other than unusual if we did not recall that the Commonwealth itself argued in *Baird* v. *Eisenstadt,* 1 Cir., 1970, 429 F.2d 1398, 1401, *aff'd,* 405 U.S. 438, that the prevention of fornication is so important that it justified withholding birth control devices from unmarried adults, with the resultant risk of pregnancy. The fact that the Court of Appeals expressed shock at this view does not mean it does not exist, but merely illustrates the degrees of variance and the strength of opinions on this subject.

Of unquestionable numerical importance, we cannot overlook the fact that many parents believe with total sincerity that abortion is morally impermissible, either under all circumstances or unless to save the life of the pregnant

woman. This leads to the significant contention pressed upon us by defendants as well as by intervenor, that some parents believe that they have separate rights as parents, and that there is a family interest, separate and apart from that of the minor. These interests, which are asserted to be of constitutional proportions, they variously describe as "parents' liberties;" the parents' right to "control," and their right to "promote and preserve the family as an important societal unit." These rights, being, by hypothesis, antithetical to the minor's, it may not be unnatural for the minor to feel that she is in trouble enough without having to become subservient to claims of others.

We have not stated all of the factual issues in this difficult area, but we believe we have stated enough to delineate the issues for present purposes. More facts will appear later when relevant.

The Minor's Consent.

The greatest divergence in the testimony related to the capacity of minors to give an informed consent.[8] At one extreme, Baird testified that in his many years experience he had never met a minor who was incapable, a conclusion supportable only on a hypothesis, which we reject, that an abortion, if not medically contra-indicated, is always the best solution, so that a minor who wants one must be presumed capable. We are also not impressed by the observation in *Washington* v. *Koome,* Wash., 1975, 530 P.2d 260, which recognized a 16-year old's consent, that "[t]he age of fertility provides a practical minimum age requirement for consent to abortion, reducing the need for

[8] We are not dealing in this case with legislation directed to the legal capacity of minors to consent to a medical or surgical procedure. *Cf. Younts* v. *St. Francis Hospital and School of Nursing, Inc.*, Kan., 1970, 469 P.2d 330, 336-38; *Smith* v. *Seibly*, Wash., 1967, 431 P.2d 719, 722-24. For reasons we shall come to, the statute goes far beyond such a principle.

a legal one." Fertility marks a physical, not emotional or intellectual maturity, and a "fertile" minor may become pregnant precisely because she lacks the capacity to reason and consent maturely. No expert testified that every minor of any age was able to make a considered decision.[9] Of necessity, there will be factual questions to weigh in each case.

Plaintiffs' experts were of the view that a majority of 16 and 17 year olds are capable. Defendants' experts, although they felt that essentially all are capable at 18, considered the 18th birthday a significant turning point, and would concede only a substantial minority at age 17. Whatever may be the value of conclusive presumptions making the 18th birthday a turning point for such matters as voting, the purchase of liquor, and entering into contracts other than certain contracts for necessaries, *cf. J. G. Pierce Co.* v. *Wallace,* 1925, 251 Mass. 383, we can attach no such factual magic to that birthday. We may also remark, parenthetically, that it is singular for the state to provide that a minor may consent to intercourse at age 16, Mass. G.L. c. 265, § 23 (statutory rape), but cannot consent to get rid of the product until she is two years older. But whichever experts are correct, it is enough for present purposes that we find that a substantial number of females under the age of 18 are capable of forming a valid consent. Our overall question, accordingly, is whether the state can be permitted to restrain the free exercise of that consent, to the extent that it has endeavored to do so.

We consider first what the statute does not do.

1. The statute does not purport to require simply that parents be notified and given an opportunity to communi-

[9] We find quite credible defendants' expert who testified that at certain periods of their lives adolescents might react maturely one day and immaturely the next.

cate with the minor, her chosen physician, or others. We mention this obvious fact because of the persistence of defendants and intervenors in arguing that the legislature could properly enact such a statute. Whether it could is not before us, and there is no reason for our considering it.

2. The statute does not exclude those capable of forming an intelligent consent, but applies to all minors. The statute's provision calling for the minor's own consent recognizes that at least some minors can consent, but the minor's consent must be supplemented in every case, either by the consent of both parents, or by a court order.

3. The statute does not purport simply to codify what we find to be accepted medical practice in Massachusetts hitherto, namely, that certain medical procedures involving minors require the consent of a parent. This statute creates a special, unique exception by requiring the consent of both parents.

4. The statute does not purport simply to provide a check on the validity of the minor's consent and the wisdom of her decision from the standpoint of her interests alone. Rather, it recognizes and provides rights in both parents, independent of, and hence potentially at variance with, her own personal interests. On being told by the court during argument that this appeared to be the statutory meaning, counsel agreed. It is the Commonwealth's position "that a parent in the decision-making process can consider interests other than the minor's. . . . The concept of liberty . . . embraces parental rights of supervision and control over children, and really what we are dealing with are competing rights of a constitutional dimension." Intervenor took the same position. We agree that this is the clear statutory intent. Whatever may be accorded to the minor by allowing her judicial review "for good cause shown," we do not regard it as meaning that the court should reverse a refusal of consent it finds reasonably made in the parent's interests.

5. As a corollary to the foregoing, the statute is not to be weighed in terms of permissible overbreadth, unavoidably applying to minors in fact capable of consenting because necessary for proper administration or enforcement with respect to minors considered incapable. The legislature made no such determination. Rather, the direct purpose is to encumber the rights of all minors facially coming within its terms.

We make this extensive analysis, which we take it all parties are in agreement with,[10] to demonstrate the two basic issues: the minor's personal rights, and the separate rights of the parents.

The Minor's Rights.

Passing for the moment the question whether there are conflicting rights, there can be no doubt but that a female's constitutional right to an abortion in the first trimester does not depend upon her calendar age. While the Court in *Roe* v. *Wade,* ante, 410 U.S. at 165 n.67, failed to pass upon whether there were any special rights in the state, or elsewhere, that could be of greater significance when the female is a minor, the Court in no way suggested that a minor lacked personal rights. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone," *In re Gault,* 1967, 387 U.S. 1, 13; *see Coe* v. *Gerstein,* S.D.Fla., 1974, 376 F.Supp. 695, 698; *Merriken* v. *Cressman,* E.D.Pa., 1973, 364 F.Supp. 913, 918-19; *Washington* v. *Koome,* ante, 530 P.2d at 263; Note, the Minor's Right to Abortion and the Requirement of Parental Consent, 1974, 60 Va.L.Rev. 305, 316-19. *Cf. In re Winship,* 1970, 397 U.S. 358, 365; *Stull* v. *School Board of Western Jr.-Sr. High School,* 3 Cir., 1972, 459 F.2d 339, 345. We see no room

[10] The dissent is seemingly of the opinion that a reviewing Superior Court judge would consider only the interests of the minor. We find no room in the statute for so limited an interpretation.

cannot be subordinated to the state any more than can be an adult's. We say this because, as previously pointed out, the statute is cast not in terms of protecting the minor, *cf. Ginsberg* v. *New York,* 1968, 390 U.S. 629, 638; *Prince* v. *Massachusetts,* 1944, 321 U.S. 158, 168, but in recognizing independent rights of parents. In this circumstance the statute does not attain validity vis-a-vis the minor by virtue of her ability (such as it is) to appeal to a Superior Court judge; this is merely a constraint on the assertion of unreasonable claims of her parents. The question comes, accordingly, do parents possess, apart from right to counsel and guide, competing rights of their own?

The Competing Rights of Parents.

The importance of the last-mentioned distinction is not to be overlooked. It is not to deny parents all rights if we invalidate this statute. As intervenor herself well illustrated, parents have years in which to teach their children, counsel them, and guide them. We may wonder how much would be accomplished by compulsorily affording a parent an eleventh hour opportunity, if adequate communication had not been established before. And we may wonder, also, whether imposing such burden on the minor would necessarily improve the family relationship. But this, as we have said, is not the statute's aim. The parents not only must be consulted, they are given a veto. Defendants do not like this word. The fact, however, that because of the right of appeal this veto may not be absolute, modifies it only to a degree. So long as parents' independent rights may be enforced, they remain formidable.

Except to assert that such rights exist, defendants and intervenor do little to demonstrate why parents should be granted individual rights independent of the minor's best interests. It is not they who have to bear the child. Once born, the minor, and not they, will be responsible for it

in all senses, financially and otherwise.[11] It is difficult to think of any self interest that a parent would have that compares with those significant interests of the pregnant minor.

Turning from discussion to decided authority, the cases cited by defendants and intervenor involving rights of parents uniformly concern situations where the parents' claimed rights are compatible with the minor's, not adverse. Such cases are of no assistance. Of course parents have rights in proper instances, to act in their children's interests. What is claimed here is something altogether different. But even if it should be found that parents may have rights of a Constitutional dimension vis-a-vis their child that are separate from the child's, we would find that in the present area the individual rights of the minor outweigh the rights of the parents, and must be protected. The single exception to this is *Planned Parenthood* v. *Danforth,* E.D.Mo., (1/31/75). We do not agree with the majority opinion.

Consequently, the parental consent requirement of Massachusetts General Laws, Chapter 112, Section 12P, is constitutionally invalid. Judgment will be entered permanently enjoining defendants from enforcing Chapter 112, Section 12P, as it relates to parental consent in any fashion. Plaintiffs to have their costs. Attorneys' fees against defendants are denied.

So ordered.

(s) BAILEY ALDRICH
U. S. Circuit Judge
(s) FRANK H. FREEDMAN
U. S. District Judge

[11] If we may take note of a comment made by a defender of such statutes on W. Buckley's *Firing Line*, Feb. 9, 1975, Southern Educational Communications Ass'n, Publisher, that having refused consent for an abortion the parents "assume a major responsibility to the infant who is going to be born," one may hope this would be so, but it would be naive not to envisage many exceptions. The statute places the burden of all exceptions on the minor.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 74-4992-F

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,

PLAINTIFFS,

v.

FRANCIS BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,

DEFENDANTS,

JANE HUNERWADEL,

DEFENDANT-INTERVENOR.

Before ALDRICH, *Senior Circuit Judge,*
JULIAN, *Senior District Judge,*
and FREEDMAN, *District Judge.*

DISSENTING OPINION
April 28, 1975

JULIAN, S.D.J. (dissenting):

I disagree with the decision of the majority. I would hold that the challenged statute [1] is constitutionally valid.

[1] That statute, Mass. G.L. c. 112, § 12P, provides:

"(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

"If one of the parents has died or has deserted his or her

It is also my opinion that in these proceedings the defendants and the parents of "Mary Moe," the 16-year-old plaintiff, have been deprived of their legal rights without due process of law.

I shall address the latter issue first.

The minor plaintiff in this case is an unemancipated, unmarried, high-school girl living with her parents and the rest of their family. At the time this action was brought she was pregnant and had been for about eight weeks. Within a matter of hours after the single judge issued a temporary restraining order enjoining the enforcement of the statute, Dr. Zupnick, a plaintiff, performed the

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family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who has assumed the care and custody of the mother is sufficient.

"(2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

"Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section 12R."

If the written consent of the proper person or persons has not been delivered to the physician performing the abortion as set forth in § 12P, and if an emergency requiring immediate action does not exist, no abortion may be performed. Mass. G.L. c. 112, § 12N. Any person who willfully violates the provisions of § 12N shall be fined not less than $100 nor more than $2,000. Mass. G.L. c. 112, § 12Q. The statute also allows the attorney general or any person whose consent is required pursuant to § 12P or common law to petition the state's superior court for an order enjoining performance of an abortion that may be performed contrary to the provisions of c. 112, §§ I-Q. Mass. G.L. c. 112, § 12R.

Roe v. *Wade*, 410 U.S. 113 (1973), at 153-154, 163, requires that a woman who consents to an abortion must also obtain the consent of a physician. Mass. G.L. c. 112, § 12P, also requires an additional consent when a minor is to have the abortion—the consent of the minor's parents, and further provides that if the parents do not consent, the consent may be obtained by court order.

abortion on the girl. Her parents were not consulted. They have no knowledge of the girl's pregnancy or of the abortion. They have no knowledge of the pendency of this action. The majority of the Court denied defendants' motion that the parents be joined as parties to the action. The name "Mary Moe" is a fictitious name. She has withheld from her parents all information concerning her pregnancy and the abortion. She has been permitted by the Court to withhold her name and address and the names and address of her parents from the defendants as well as from the Court itself. The majority went further and ordered the defendants not to make any attempt to discover her identity or the identity of her parents.[2] The majority have thus made it impossible for the defendants to call the parents as witnesses at the trial or to take their depositions. The minor testified at the trial and the majority have made findings of material facts on the basis of her uncorroborated testimony. Some of the findings relate to the parents and reflect adversely upon their performance of their parental duties. The concealment of the identity of the parents precluded the defendants from rebutting the girl's testimony and from impeaching her credibility. They were also precluded from presenting evidence concerning the degree of maturity that the girl had attained[3] and the competence, fitness and willingness

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[2] Appropriate precautions to prevent public disclosure of the minor's identity would have sufficed. There was no need for the Court to suppress the disclosure of probable sources of relevant evidence.

[3] The majority find as a fact that "Mary Moe is of ample intelligence to, and in fact does, fully understand the nature of this action." The evidence before this Court is insufficient to justify such a finding. Plaintiff minor has not been shown by the evidence to possess a higher degree of intelligence than the average adolescent of her age. Based on the general experience of mankind, judicial notice may be taken that the average adolescent of sixteen does not "fully understand" the difficult substantive issues raised by this action.

of her parents to act as her guardians in this litigation and look after her best interests.[4]

Adjudication of this case significantly affects constitutional, statutory and common-law rights of the parents. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin* v. *Hale,* 68 U.S. 223, 233 (1863), as quoted approvingly in *Goss* v. *Lopez,* 43 U.S.L.W. 4181, 4185 (U.S. Jan. 22, 1975).[5] Since the majority have made this a class action,[6] the temporary restraining order issued by a single judge and extended by the majority irreparably abridged not only the rights of the parents of plaintiff Mary Moe, but also the rights of the parents of all unmarried pregnant minors under the age of 18, that is, girls from about 12 years of age through 17, whose daughters have been aborted without any notice to the parents. The decision of the majority deprives the parents of their parental rights without notice or opportunity to be heard concerning the existence of those rights. These parents have thus been deprived of their parental rights without due process of law. *Roller* v. *Holly,* 176 U.S. 398 (1900); see *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 123 (1968); Federal Rules of Civil Procedure 12(b)(7), 19; 7 Wright & Miller, Federal Practice and Procedure: Civil § 1602 at 20 (1972). A decision entered in violation of the essential requirements of due

[4] The courts require a strong case to be made before they will interfere, or permit strangers to interfere, with the parents' guardianship. See, generally, "Readings in the History and System of the Common Law," Pound and Plucknett, 3d ed., 1927, at p. 496.

[5] *Roller* v. *Holly*, 176 U.S. 398, 409 (1900): "That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citation of authority would give additional weight; . . . ."

[6] In my view, the majority have failed to comply with the requirements of Rule 23 of the Federal Rules of Civil Procedure relating to class actions.

process of law is void. *Bass* v. *Hoagland,* 172 F.2d 205, 209 (5 Cir.), *cert. denied,* 338 U.S. 816 (1949); *United States* v. *Manos,* 56 F.R.D. 655, 659 (S.D. Ohio, 1972); *see Roller v. Holly, supra.*

The majority have deprived the parents of the minor plaintiff of their parental rights without due process of law. The procedure followed in this case has also effectively deprived the defendants and intervenor of their right to call and examine witnesses before and during trial and to test the veracity of the minor plaintiff as a witness.

In addition to refusing to permit joinder of the parents as parties to this action, the majority have refused to appoint a guardian ad litem for the minor, thus leaving her without the protection of her natural guardians and of a court-appointed guardian.

The majority's stated reason for its failure to appoint a guardian ad litem for the minor is that

> "Her interests in the facial interpretation of and effect of the statute are fully represented by her competent counsel, and to the extent that there may be thought to be any conflicting interests, by the action of competent counsel for the intervening parent."

Counsel for the plaintiffs was never appointed guardian ad litem for the minor plaintiff and never purported to act as her guardian. At no time before or during trial was he ever informed that he was guardian ad litem for the minor plaintiff. Except as to the issue of the constitutionality of the state statute, the record fails to disclose that counsel for the plaintiffs had the slightest concern for the welfare of the minor plaintiff. The record shows that his sole objective was to have the state statute declared unconstitutional for the benefit of the adult and corporate plaintiffs by eliminating it as a legal obstacle to the performance of abortions on minors under the age of 18. The Court should have appointed a guardian ad litem for the minor

plaintiff to ensure proper representation of her interests. See Federal Rules of Civil Procedure 17(c).

Counsel for the minor plaintiff and her "class" was also counsel for the other plaintiffs whose real interests conflicted with those of the minors. The plaintiffs other than the minors receive substantial income from the abortions performed on minors and thus have a financial interest in the outcome of this litigation. Parents Aid Society, Inc.,[7] receives fees for abortions which it shares with the abortionist, Zupnick.[8] Baird insists that he does not receive

[7] On all the pertinent evidence it is more probable than not that Parents Aid Society, Inc., is Baird's alter ego.

[8] Zupnick lives in New York. He commutes to Boston to perform abortions on two days each week. The Boston abortions are not the full extent of his practice, however. Zupnick also performs abortions in New York two days each week. Zupnick's medical practice is limited to performance of first trimester abortions in facilities of Parents Aid Society, Inc., in Boston and New York. Zupnick is paid well, as his testimony shows:

"Q. Is there a maximum price for an abortion at Parents Aid Society?

"A. Yes. The abortion fee is on a sliding scale from the patient's ability to pay to a maximum of $150.

"Q. In the case where $150 is charged, what do you receive in that instance?

"A. Usually a third.

"Judge Freedman: Is that paid on a monthly basis?

"The Witness: No. It is paid on a daily basis. I am given a check at the end of the day.

"Q. What was the amount of the last check that you received from the Parents Aid Society?

[An objection is stated and overruled]

"A. I honestly don't recall the exact figure. I believe it was in the area of $600.

"Q. You have received checks higher than that amount?

"A. Higher and lower, yes.

"Q. Does that constitute reimbursement for two days work?

"A. That is correct.

* * * * *

"Judge Freedman: I would be interested, Doctor, in the number of abortions you performed—the percentage of those that incorporate fees of the maximum $150 as opposed to those that are actually free.

funds from Parents Aid Society, Inc.: "[N]ot one penny has come to me in eleven years." (December 31, 1974, Tr. p. 120). Baird's wife, however, receives funds from Parents Aid Society, Inc., in Baird's words: "because I was not earning enough money to feed her and the family." (*Id.*)

The plaintiffs, including the minor, were represented by the same counsel. Parents Aid Society, Inc., Zupnick, Baird, and Baird's wife and children, however, directly or indirectly, derive financial advantage from the abortions. The financial interests of those plaintiffs, however, are in conflict with the minor's "very real need . . . to have her own personal rights and interests protected." *Noe* v. *True*, 507 F.2d 9, 12 (6 Cir. 1974).

The interests of the minors in this litigation are of a different nature and far more important than the monetary interests of the other plaintiffs. They are in collision and should not have been represented by the same counsel. Advocacy on behalf of the minor should have sought to protect her from possible overreaching on the part of adults such as Baird or Zupnick. No consideration appears to have been given to the possibility that the abortion may have been adverse to her best interests. Counsel made

"The Witness: As I said before, it is not always free or $150. It is on a sliding scale basis. If you are asking me how many patients pay the total of $150 fee—

"Judge Freedman: Yes. How many people pay no fee on a percentage basis?

"The Witness: I would say probably about two-thirds pay the $150 fee and probably about 15% are done for free, and then there is a scale in between on the other patients. . . .

* * * * *

"Q. When the patient walks into the operating room, typically that is the first time she has met you?

"A. Usually, yes.

"Judge Freedman: How long does the typical abortion procedure last?

"The Witness: The average technical part of the procedure is five to seven minutes."

(December 31, 1974, Tr. pp. 15-17, 28.)

no attempt to determine the emotional impact the abortion might have on her.

The interests of the minor plaintiff were not adequately represented. The Court should not have deprived the minor of the guidance, counsel and care that her parents were under a legal obligation to provide, and might have provided if her condition had not been concealed from them. If the parents had been informed and nevertheless had failed to act, the Court should have assumed the ultimate responsibility for any determination made on behalf of the minor by appointing a guardian ad litem.[9] See *Noe* v. *True*, 507 F.2d 9, 11-12 (6 Cir. 1974).

The majority find that Mary Moe was competent to make and effectuate the decision to abort. The majority also find there are other unmarried pregnant minors in Massachusetts who have adequate capacity to give a valid and informed consent to an abortion. These findings are not warranted by the evidence.

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[9] In *Foe* v. *Vanderhoof*, Civ. A. No. 74-F-418 (D. Colo., Feb. 5, 1975), which is relied upon by the majority, the court did not appoint a guardian ad litem. The court found the emancipated minor plaintiff's interests were fully protected by her counsel and social worker. Counsel, however, did not represent conflicting interests. Moreover, the *Vanderhoof* court found that the plaintiff had met with her mother, doctor and social worker to discuss her pregnancy, abortion procedures and the consequences of the decision. The *Vanderhoof* court also appointed an obstetrician and a psychiatrist to examine and counsel the plaintiff. The appointed doctors agreed she should have an abortion. The *Vanderhoof* court thus assumed responsibility for determinations made on the minor's behalf. In contrast with the meticulous procedure in *Vanderhoof*, Mary Moe, for example, had perfunctory contact with the attorneys and abortionists. No professionals were appointed to examine or counsel her prior or subsequent to the issuance of the temporary restraining order or performance of the abortion. The majority's failure to take any precautions for the protection of the minor's best interests is particularly ironic since Mass. G.L. c. 112, § 12P, which the majority strike down, allows recourse to the state court when parental consent is denied. The state court would have been able to protect th minor's best interests as did the *Vanderhoof* court.

In order for consent to be informed, a minor must understand the emotional as well as the physical consequences which may follow from an abortion. The testimony of the psychiatrists is unanimous on this point. Tr. of testimony of Dr. Carol Nadelson, assistant professor of psychiatry at Harvard Medical School, December 30, 1974, pp. 118, 127-132; Tr. of testimony of Dr. Raymond C. Yerkes, child psychiatrist, Director of the Child Service at the Greater Lawrence Mental Health Center, January 28, 1975, pp. 50-52. No testimony was offered, however, concerning the emotional consequences the abortion may or will have upon Mary Moe. No testimony was presented concerning Mary Moe's understanding of those consequences or her ability to understand them. In making their findings the majority must necessarily have applied a test of informed consent which looks only to the minor's ability to understand the consent form, surgical procedure and direct physical effects. The majority disregard that aspect of informed consent which requires that a minor must understand the emotional consequences which may follow an abortion.

Parents have rights and responsibilities that inhere in the parent-child relationship and stem from the fact, nature and purpose of parenthood. These rights and responsibilities are not inimical to the minor's rights and welfare. They exist for the benefit of the child and protection during the child's formative years. The state has a compelling interest in protecting the parental rights and duties against unauthorized intrusion by third persons. The statute under attack expresses this compelling interest.

The liberty guaranteed by the Fourteenth Amendment "denotes . . . the right of the individual . . . to marry, establish a home and bring up children, ..." *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923). The Constitution guarantees

> "the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

Pierce v. *Society of Sisters,* 268 U.S. 510, 534-535 (1925). See *Roe* v. *Wade,* 410 U.S. 113, 152-153 (1973); *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944); see also *Weinberger* v. *Weisenfeld,* 43 U.S.L.W. 4393, 4398 (U.S. March 19, 1975). This right and duty of the parents to prepare the child for additional obligations "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wisconsin* v. *Yoder,* 406 U.S. 205, 233 (1972).

The Commonwealth of Masachusetts recognizes that a child benefits from parental guidance and protection and fully acknowledges the freedom and responsibility of parents to direct the upbringing of their children. *Commonwealth* v. *Brasher,* Mass. , 270 N.E.2d 389, 394 (1971).[10] Indeed, it is the articulated policy of Massachusetts to strengthen and encourage family life for the protection and care of the child. Mass. G.L. c. 28A, § 1; c. 119, § 1.

The question of the constitutionality of statutes requiring parental consent to the abortion has been explicitly left open in *Roe* v. *Wade,* 410 U.S. 113 (1973).[11] There is nothing in that opinion or in the opinion in the companion

[10] Mass. G.L. c. 112, § 12P, is one of many state statutes designed to protect the child from her own improvidence and from overreaching by adults by requiring parental consent as a prerequisite to the child's engaging in a specified activity. *E.g.*, Mass. G.L. c. 131, § 14; c. 140, §§ 131, 179; c. 207, § 7; c. 208, § 30; c. 210, § 2; c. 248, § 35; c. 272, § 1.

[11] At page 165, n. 67, the Court stated: "We need not now decide whether provisions of this kind [provision requiring parental consent] are constitutional."

case of *Doe* v. *Bolton, id.,* at page 179, that abrogates or erodes the rights and responsibilities of parents. Those decisions do not remove the pregnant, unemancipated minor from the care and custody of her parents. The parents still remain her natural guardians with undiminished responsibility for her welfare.

The State parental consent statute protects an interest which is completely separate from the State's interest in the protection of the pregnant woman's health or the unborn child's life. The statute protects the right of the parents to the liberty guaranteed them by the Fifth and Fourteenth Amendments. The statute protects the family relationship, the right and duty of parents to bring up their child, the right and duty of parents to inculcate moral standards; the statute provides protection for the parents' right and duty to make reasonable decisions, in the first instance, for the control and proper functioning of the family as a harmonious unit. The statute ensures that parents will have the opportunity to guide and counsel their daughter, and play a supportive role during and after the pregnancy.[12]

[12] Mrs. Jean Hunerwadel, the intervenor, holds a B.S. in Early Childhood Education and Child Development from St. Joseph's College, West Hartford, Conn. She has worked at the James Jackson Putnam Children's Center Clinic for emotionally disturbed pre-school children and as a kindergarten teacher and director of a nursery school. Mrs. Hunerwadel's testimony concerning the role of parents is pertinent and helpful:

> "Q. Now, I ask you this, Mrs. Hunerwadel, are there circumstances in which you would consent to an abortion to be performed on one of your daughters were she to be found to be pregnant, unmarried and under age 18?
>
> "A. Yes, there are.
>
> "Q. Tell us what those circumstances would be.
>
> "A. We would like to understand the circumstances which led to her pregnancy, the circumstances in her life. We would like to know about the boy by whom she became pregnant, about her feelings about the pregnancy, her feelings about the baby, her feelings about the boy who would be the father of

The majority attack the statute because it requires the consent of both parents. Parental rights and duties, however, inhere in both parents by reason of their parenthood

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the child. We would like to be able to make available to her our support and our interest and our care as we have from the time that we have known she was coming to us.

"We would like to be sure that she has available all of the alternatives that are available to her and all of the resources in the community, and we would like the opportunity to have her know that we will continue to support her, and if she should decide, in spite of what we were able to show to her in terms of alternatives and support and how we felt, that she just must have an abortion, we would consent to that; that that would not be the end of our involvement.

"We would also want to be sure that she had a gynecologist-obstetrician whom we felt was professionally skilled, and beyond that, who had the qualities of interest and sensitivity and humanitarianism which we regard to be important in physicians; and we would also want to be sure that the facility that was chosen in which the abortion were to be done, because we do not regard the situation of unplanned pregnancy to be a separate situation which is begun, ended and then is out of the youngster's life.

"We feel that the youngster, as everybody does, brings feelings of circumstances into the situation and that also circumstances and feelings continue after, whether it is a completed pregnancy or an abortion.

"And we would foresee needing follow-up care for this youngster, psychiatrically, probably, at some time if not immediately.

"So those kinds of decisions would be very important to us to help her to make."

(January 28, 1975, Transcript pp. 77-78.)

The testimony of each medical expert, whether called by the plaintiffs or defendants, establishes the validity of Mrs. Hunerwadel's position. While the experts differ concerning the necessity for parental consent, each indicated that parental involvement in the abortion decision is helpful, benefits the child, and should be encouraged. Tr. of testimony of Dr. Somers H. Sturgis, emeritus professor in gynecology at Harvard University, Dec. 7, 1974, p. 27, Dec. 30, 1974, pp. 5-6, 8-9, 19; Tr. of testimony of Dr. Jane E. Hodgson, associate professor of obstetrics and gynecology at the University of Minnesota, Dec. 7, 1974, pp. 66-67, Dec. 30, 1974, pp. 75-77, 80-81; Tr. of testimony of Dr. Carol Nadelson, assistant professor of psychiatry at Harvard Medical School, Dec. 30, 1974, pp. 115-116, 119-121, 130; Tr. of testimony of Dr. Jules Rivkind, chairman of the

and are guaranteed equally to both parents by the Constitution. The statute before us recognizes that one parent cannot lawfully usurp the rights and duties of the other, *Weinberger* v. *Weisenfeld,* 43 U.S.L.W. 4393, 4398 (U.S. March 19, 1975),[13] and requires the consent of both except as otherwise provided in the statute.

Minors, of course, possess constitutional rights. Constitutional rights, however, are not absolute. Their exercise may be made subject to reasonable conditions.[14] The constitutional right of an adult woman to have an abortion, for example, has been conditioned by the Supreme Court upon the concurrence of a physician in her decision. The purpose of the condition is to provide a safeguard against the possibility of a medically inadvisable decision. See *Roe* v. *Wade,* 410 U.S. at 153. With respect to minors, the power of the state to limit or regulate the exercise of constitutional rights has been recognized by the Supreme Court. In *Ginsberg* v. *New York,* 390 U.S. 629 (1968), the Court, at page 638, states:

> "... [W]e have recognized that even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults ....' *Prince* v. *Massachusetts,* 321 U.S. 158, 170."

Department of Obstetrics and Gynecology at Mercy Hospital, Pittsburgh, Pa., Jan. 28, 1975, pp. 15-18; Tr. of testimony of Dr. Raymond C. Yerkes, child psychiatrist, Director of the Child Service at the Greater Lawrence Mental Health Center, Jan. 28, 1975, pp. 47-50, 63-64.

[13] At page 4398: "And a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection.' "

[14] "We . . . conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." *Roe* v. *Wade*, 410 U.S. 113, at 154.

See also *United States* v. *Bisceglia*, 43 U.S.L.W., 4242, 4243 (U.S. Feb. 19, 1975).

And again at page 639:

> "The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in § 484-h upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince* v. *Massachusetts,* supra, at 166."

I find, therefore, no conceivable constitutional objection to legislation providing in the case of a pregnant minor an additional condition designed to make certain that she receive parental or judicial guidance and counselling before having the abortion. The requirement of consent of both parents[15] ensures that both parents will provide counselling and guidance, each according to his or her best judgment. The statute expressly provides that the parents' refusal to consent is not final. The statute expressly gives the state courts the right to make a final determination. If the state courts find that the minor is mature enough

[15] The majority speculate concerning possible interpretations of the "for good cause shown" language. There is also some doubt whether the statute requires consent of one or both parents. The construction of the statute is a matter of state law. If the majority believe the only constitutional infirmities arise from their interpretation of the statute, the majority should certify questions of state law to the Supreme Judicial Court of Massachusetts pursuant to Rule 3:21 of that court in order to receive a definitive interpretation of the statute. See *Hendrickson* v. *Sears*, 495 F.2d 513 (1 Cir. 1974).

to give an informed consent to the abortion and that she has been adequately informed about the nature of an abortion and its probable consequences to her, then we must assume that the courts will enter the necessary order permitting her to exercise her constitutional right to the abortion. There is no basis for a contrary assumption.[16] In the case of an adolescent girl who finds herself in an emotional crisis of this kind it is important to make certain that she receive guidance and support from her parents who normally, more than any other person, have the strongest natural interest in her welfare. In the event that the parents refuse their consent, guidance and support will be provided by the state court judge in his role of parens patriae. The requirement of parental consent makes it necessary that the parents be informed and consulted about the girl's serious problem. The girl's condition would not then be concealed from her parents as has been done in this case with the cooperation of this Court as though her parents, whom we do not know and have not heard, were her natural enemies and not her natural guardians.

Parental rights and duties are recognized and guaranteed by the Constitution as necessary to the welfare of the minor children themselves, as well as of the family of which they are a part. The state has a compelling interest in the protection of these parental rights and duties. The statute is necessary to protect this compelling interest and is narrowly drawn to do just this. The statute is constitutional. *Planned Parenthood* v. *Danforth,* Civ. No. 74-416 C(A) (E.D. Mo. 1975), enforcement stayed, 43 U.S.L.W. 3451 (U.S. Feb. 14, 1975). The statute before us is specifically designed to protect pregnant minors under 18 years of age against their own improvidence due to immaturity of judgment, and against overreaching by others.[17] The enactment

[16] "Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsi-

of such a statute is a valid exercise of the state's police power and also of its power as parens patriae. *Ginsberg* v. *New York*, 390 U.S. 629 (1968); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944).

The statute is a proper exercise of constitutional power by the Commonwealth of Massachusetts and is therefore valid. The decision of the majority deprives the defendants and the parents of the minor plaintiff of their legal rights without due process of law.

For these reasons I dissent from the decision of the majority.

(s) ANTHONY JULIAN
U. S. Senior District Judge

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bilities. This we refuse to do." *Huffman* v. *Pursue, Ltd.*, 48 U.S.L.W. 4379, 4385 (U.S. March 18, 1975).

[17] Massachusetts, like other states, has many laws, both decisional and statutory, designed to protect minors from their own improvidence and from possible overreaching. *See, e.g., Commonwealth* v. *Nickerson*, 87 Mass. (5 Allen) 518 (1863); M.G.L. c. 10, § 29; c. 90, §§ 8, 8A, 8B, 10; c. 105, § 3-207; c. 119, c. 127, § 22; c. 128A, § 10; c. 131, § 14; c. 138, § 34; c. 140, §§ 122, 130, 131, 179, 198; c. 147, § 35; c. 149; c. 191, § 1; c. 207, §§ 7, 9, 24, 25; c. 208, § 30; c. 210, §§ 2, 5A; c. 248, § 35; c. 265, §§ 13B, 22A; 23, 24B; c. 269, §§ 12A, 12B; c. 270, § 6; c. 272, §§ 1, 4, 28, 35A, 58.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 74-4992-F

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,

PLAINTIFFS,

v.

FRANCIS BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,

DEFENDANTS,

JANE HUNERWADEL,

DEFENDANT-INTERVENOR.

ORDER

In accordance with our opinion of April 28, 1975, Section P of Mass. G.L. c. 112, and such other portions of the chapter insofar as they make specific reference thereto are hereby declared to be unconstitutional and void, and defendants are enjoined from enforcement thereof.

(s) BAILEY ALDRICH
U. S. Circuit Judge

(s) FRANK H. FREEDMAN
U. S. District Judge

April 28, 1975

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 74-4992-F

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,

PLAINTIFFS,

v.

FRANCIS BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,

DEFENDANTS,

JANE HUNERWADEL, for herself and all others similarly situated,

DEFENDANT-INTERVENOR.

SUBSTITUTE

ORDER

Inadvertencies in the order entered April 28, 1975 are hereby corrected by substituting therefor the following order as of April 28, 1975, nunc pro tunc.

In accordance with our opinion of April 28, 1975, Section 12P of Mass. G.L. c. 112, and such other portions of the chapter insofar as they make specific reference thereto are hereby declared to be unconstitutional and void, and defendants are enjoined from enforcement thereof.

(s) BAILEY ALDRICH
U. S. Circuit Judge

(s) FRANK H. FREEDMAN
U. S. District Judge

May 9, 1975

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 74-4992-F

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,

PLAINTIFFS,

v.

FRANCIS BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,

DEFENDANTS,

JANE HUNERWADEL,

DEFENDANT-INTERVENOR.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the defendants, Francis X. Bellotti, Attorney General for the Commonwealth of Massachusetts, Garrett Byrne, District Attorney of the County of Suffolk, Commonwealth of Massachusetts and the District Attorneys for all other counties in the Commonwealth of Massachusetts, hereby appeal to the Supreme Court of the United States from the order entered by this Court on April 28, 1975 and as amended by this Court's Substitute Order entered May 9, 1975, which declared Section 12P of the Massachusetts General Laws Chapter 112, and such other portions of the chapter insofar as they make specific reference thereto, unconstitutional and void, and enjoined the defendants from enforcement thereof. Said statute makes it a criminal offense to perform an abortion

upon a minor without the consent of both parents as well as that of the minor, with certain exceptions, the most important being that the parents' refusal may be overruled by a superior court judge "for good cause shown".

This Appeal is taken pursuant to 28 U.S.C. § 1253.

By their attorney

(s) MICHAEL EBY

MICHAEL EBY

Assistant Attorney General

CERTIFICATE OF SERVICE

I, Michael Eby, a member of the bar of the United States District Court for the District of Massachusetts, hereby certify that I have mailed a copy of the within Notice of Appeal to Brian A. Riley, Esquire, Suite 504, 100 Charles River Plaza, Boston, Mass., and Roy Lucas, Esquire, 27 State Street Boston, Mass., on this 16th day of May, 1975.

(s) MICHAEL EBY

MICHAEL EBY

filed May 16, 1975

Supreme Court, U. S.
FILED
JAN 9 1976
MICHAEL RODAK, JR., CLERK

JOINT APPENDIX

In the Supreme Court of the United States.

OCTOBER TERM, 1975.

Nos. 75-73, 75-109.

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,
APPELLANTS IN No. 75-73,

v.

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,
APPELLEES.

JANE HUNERWADEL,
for herself and all others similarly situated,
INTERVENOR, APPELLANT IN No. 75-109.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Appeal Docketed July 12, 1975.

Jurisdiction Noted November 17, 1975.

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In the printing of this Appendix all spellings conform to those in the original documents.

United States District Court
District of Massachusetts.

WILLIAM BAIRD; MARY MOE I; MARY MOE II; GERALD ZUPNICK, M.D.; PARENT'S AID SOCIETY, INC.; and all others similarly situated,
PLAINTIFFS,

v.

ROBERT QUINN, Attorney General of the Commonwealth of Massachusetts;
GARRETT BYRNE, District Attorney of the County of Suffolk; their agents, successors, those acting in concert with them, and all others similarly situated,
DEFENDANTS,

CIVIL ACTION
No. 74-4992-F

KATHLEEN ROTH, JOHN J. LALLY, JR., PATRICIA A. LALLY, FRANK GIBSON, ELIZABETH GIBSON, MARY STANTON, PAUL ALYWARD, JOSEPH HEALY, CATHERINE HEALY, JANE HUNDERWADEL, JEAN HEALY, RITA CALLAHAN, R.N., JERRIL WALSH, R.N., JANE DOE, individually and on behalf of all others similarly situated and, further, as next friend of their minor daughters who are of childbearing age and are or may become pregnant, and all others similarly situated.
DEFENDANT-INTERVENORS.

1974

October

30 Complaint filed, request for TRO, three-judge court.

30 Summons issued.

31 Affidavit of notice and service filed.

31 Motion for leave to have out-of-state counsel appear Pro Hac Vice FILED.

31 Application for temporary restraining order FILED.

31 Memorandum of law FILED.

31 *FREEDMAN, J.* Hearing on plaintiff's motion for temporary restraining order and request for three-judge court; arguments; Court directs the convening of a three-judge court and further directs that the requested temporary restraining order be entered.

31 *FREEDMAN, J.* ORDER ENTERED. . . . that defendants are hereby enjoined from enforcing the parental consent requirement of the Mass. Abortion Law, Gen. Laws, ch. 12P, pending further order of this court.

November

6 Designation of three-judge court — Judge Aldrich, Judge Julian, Judge Freedman.

13 Ds' motion to dismiss and/or for summary judgment and motion for a more definite statement FILED with cs.

13 Notice of deposition of WILLIAM BAIRD, FILED with cs.

13 Notice of deposition of MARY MOE I and MARY MOE II, FILED with cs.

1974

November

13 Notice of deposition of GERALD ZUPNICK, FILED with cs.

14 *JUDGES ALDRICH, JULIAN, FREEDMAN* — Three-judge court hearing on continuation of temporary restraining order; after arguments; plaintiff's motion to add additional party plaintiffs, allowed (affidavits of Mary Moe III and Mary Moe IV to be filed with the Clerk and impounded). Prospective motion of parents to intervene as defendants will be allowed, if filed, by a single justice. It is ordered that dissolution of temporary restraining order is denied; (Judge Anthony Julian, dissenting). Memorandum of defendants in support of their motion to dismiss and/or for summary judgment, FILED. Hearing on preliminary injunction scheduled for Dec. 9, 1974, at 10:00 a.m.

19 Interrogatories propounded by defendants to plaintiffs pursuant to Rule 26(b)(4)(A)(ii) FILED with cs.

19 Ds' motion to compel plaintiffs to answer interrogatories regarding their expert witness by November 29, 1974, FILED with cs.

19 Motion to intervene as defendants (Parents) FILED with cs.

19 Defendant-Intervenors' Answer and Counterclaim FILED with cs.

20 *FREEDMAN J.* Re motion to intervene — "Motion to intervene allowed. Motion to impound will be acted upon by the three-judge court." cc/cl.

1974

November

29 Motion for leave to appear of Brian Riley in behalf of intervenors FILED. cs.

December

4 Appearance of Robert Reynolds in association with Mary Welby as counsel for intervenors.

9 P's motion to join all district attorneys in Commonwealth as members of defendant class and to extend injunctive restraints to all said defendant FILED with cs.

9 P's motion to vacate order allowing intervention FILED with cs.

9 Memorandum of law in support of motion to vacate order allowing intervention FILED.

9 Ps' motion to certify plaintiffs' classes FILED.

9 Memorandum of law in support of motion to certify class action FILED.

9 Motion of the Civil Liberties Union of Massachusetts and the Planned Parenthood League of Massachusetts for leave to file a brief Amici Curiae FILED.

9 Memorandum of interveners in opposition to plaintiffs' request for a preliminary injunction FILED with cs.
ALDRICH, C.J., JULIAN, S.D.J.

9 *FREEDMAN, J.* Motion of Mary T. Welby Esq. for leave to appear on behalf of intervenors ALLOWED. Motion to join all District Attorneys in Commonwealth as members of defendant class and to extend injunctive restraints to all said defendants, ALLOWED. Motion of Civil Liberties Union of Mass. and the Planned Parenthood

1974

December

9 League of Mass. for leave to file a brief of Amici Curiae, ALLOWED. Hearing on plaintiff's motion for preliminary injunction; evidence; testimony; continued to Monday December 30, 1974 at 10:00 a.m. for further hearings pursuant to F.R.C.P. 65(a)(2) injunctive relief and merits.

9 *FAGAN, DEP. CLERK* Re motion of the Civil Liberties Union of Massachusetts and the Planned Parenthood League of Mass. for leave to file a brief Amici Curiae — "ALLOWED". cc/cl.

9 *FAGAN, DEP. CLERK* Re motion to join all district attorneys in Commonwealth as members of defendant class — "ALLOWED". cc/cl.

13 Defendants' motion in opposition to plaintiffs' motion to vacate order allowing intervention, and in opposition to plaintiffs' motion to certify plaintiffs' class FILED with cs.

13 Defendants' memorandum in support of their motion in opposition to plaintiffs' motions to vacate this Court's order of intervention, and certify plaintiffs' classes FILED.

13 Defendants' motion to dismiss plaintiff's complaint as to Mary Moe II as a result of her failure to attend deposition FILED WITH CS.

13 Memorandum of interveners in opposition to plaintiffs' motion to vacate order allowing intervention FILED with cs.

19 Letter dated Dec. 19 from Plaintiffs' counsel requesting two hour in camera hearing.

1974

December

23 Defendants' motion requesting the court to take additional testimony during a day in late January FILED with cs.

30 *ALDRICH, C.J., FREEDMAN, D.J., JULIAN S.D.J.* three judge court hearing on plaintiff's motion for preliminary injunction consolidated with merits; evidence; defendants request for disclosure, filed. Stenographic transcript of proceedings on December 7, 1974 filed.

31 *ALDRICH, C.J., FREEDMAN, D.J., JULIAN S.D.J.* Hearing on plaintiffs motion for preliminary injunction; evidence; luncheon recess; In Camera hearing witness, Mary Moe I. Court orders testimony at In Camera hearing be impounded, plaintiff, plaintiff rests; case continued to January 28, 1975 at 10 a.m.

30 Court reporter's transcript of proceedings of December 7, 1974.

1975

January

7 *FREEDMAN, J.* ORDER ENTERED. . . . The Court orders that all briefs that parties desire to file in this case shall be filed with the Clerk of Courts by January 28, 1975. cc/cl.

24 Letter dated January 23, 1975 from Interveners attorney stating corrections in Interveners Motion to Intervene and Answer.

1975

January

27 Court reporter's transcript of proceedings December 30, 1975.

27 Court reporter's transcript of proceedings December 31, 1975.

27 Interveners' brief in opposition to plaintiffs' complaint for declaratory and injunctive relief FILED with cs. (Copies delivered to Judges Julian and Aldrich.

28 Appearances of Brian Riley and Mary Laura Russell as counsel for intervenors.

28 Appearance of John Mahoney II as counsel for D.A. Garrett Byrne FILED.

28 *FREEDMAN, J.* Hearing on plaintiff's motion for preliminary injunction continued from December 31, 1974; defendants' evidence; defendants' brief filed; evidence; TAKEN UNDER ADVISEMENT.

February

18 Court reporter's transcript of proceedings of January 28, 1975 FILED.

19 Copy of recent decision by U.S. District Court for district of Colorado filed by Mr. Lucas.

26 DEPOSITIONS OF DR. G. ZUPNICK & WILLIAM BAIRD.

26 Copy of decision re Planned Parenthood of Central Missouri vs Danforth et al received.

April

28 *ALDRICH, D.J. AND FREEDMAN, D.J.* Opinion filed.

28 *JULIAN, D.J.* Dissenting opinion filed.

1975

April

28 *ALDRICH, D.J. AND FREEDMAN, D.J.* ORDER ENTERED . . . In accordance with our opinion of April 28, 1975, Section P of Mass. G.L. c. 112, and such other portions of the chapter insofar as they make specific reference thereto are hereby declared to be unconstitutional and void, and defendants are enjoined from enforcement thereof. cc/cl.

29 Copy of Opinion, Dissenting opinion and Order to West Publishing, Mass Lawyers Weekly, NCAIR and Opinion book, U.S. Law Week and Administrative Office of the U.S. Courts.

May

9 *ALDRICH, D.J., FREEDMAN, D.J.* SUBSTITUTE ORDER ENTERED . . . in accordance with our opinion of April 28, 1975, Sec. 12P of Mass. G.L. and such other portions of the chapter insofar as they make specific reference thereto are hereby declared to be unconstitutional and void and defendants are enjoined from enforcement thereof. cc/cl.

16 Appearance of Michael Eby, Asst Atty General for defts filed.

16 Notice of Appeal to the Supreme Court of the United States re: defts.

20 Notice of Appeal to the Supreme Court of the United States re: deft-intervenor filed.

June

20 Certified copy of Docket entries and original pleadings forwarded to the United States Supreme Court.

United States District Court.
District of Massachusetts.

[Title omitted in printing.]

Verified Complaint in Class Action for Temporary Restraining Order, Preliminary and Permanent Injunctions, and Declaratory Judgment against Unconstitutional Requirement of Parental Consent for Abortion.

NATURE OF ACTION.

1. This is a civil action for a declaratory judgment, a temporary restraining order, preliminary, and permanent injunctions prohibiting enforcement of the parental consent requirement for abortion, Gen. Laws, ch. 112, Sec. 12P, recently enacted by the Legislature and enforced by Defendants.

2. The parental consent requirement unconstitutionally restricts the performance of abortions in violation of the principles set out in *Roe* v. *Wade*, 410 U.S. 113 (1973), *Doe* v. *Bolton*, 410 U.S. 179 (1973), and *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

3. The parental consent rule is presently inflicting grave and irreparable injury upon Plaintiffs and minor women, and must be enjoined, because it burdens, limits, and in many instances precludes access to medical abortion procedures in Massachusetts, arbitrarily discriminates against a single class of medical procedures and patients, and abridges fundamental personal constitutional rights protected by the Fourteenth Amendment.

II. Jurisdiction.

4. Jurisdiction is conferred by Act of Congress, 28 U.S.C. sec. 1343(3), 1331, and relief authorized by Sec. 1 of the Enforcement Act of 1871, currently 42 U.S.C. sec. 1983, and the Declaratory Judgment Act. 28 U.S.C. sec. 2201.

5. In order to avoid action by Defendants, Plaintiffs must apply to this Court for a temporary restraining order, to prevent grave and immediate irreparable injury.

6. In an action such as this, a single district judge "may, at any time, grant a temporary restraining order to prevent irreparable injury," 28 U.S.C. sec. 2284(3), pending a hearing and decision by a three-judge court.

7. A three-judge district court must hear the prayers for preliminary and permanent injunctive relief, as required by 28 U.S.C. secs. 2281, 2284.

III. Parties.

8. Plaintiff WILLIAM BAIRD is a resident and citizen of the State of New York.

9. Plaintiffs MARY MOE I & II are pregnant minors under the age of 18, and residents and citizens of the Commonwealth of Massachusetts.

10. Plaintiff GERALD ZUPNICK, M.D., is a resident and citizen of the State of New York.

11. Plaintiff PARENTS AID SOCIETY, INC., is a Chapter 180 not-for-profit corporation organized under the laws of the Commonwealth of Massachusetts, with principal offices at 673 Boylston Street, Boston, Massachusetts. Plaintiff BAIRD is President of the corporation.

12. Defendants are all residents and citizens of the Commonwealth of Massachusetts.

IV. Class Action Allegations.

13. Plaintiffs are representative of and sue on behalf of all individuals, physicians, and organizations adversely affected by the parental consent requirement.

14. Plaintiffs MARY MOE I & II are prevented by the parental consent law from obtaining abortions which they are seeking to have performed by Dr. Zupnick at the Parents Aid Society Abortion Center, and sue on behalf of all other pregnant minors.

15. Plaintiff WILLIAM BAIRD is director and chief counselor of the center operated by Plaintiff PARENTS AID SOCIETY, INC., for the purposes of providing, inter alia, contraception, abortion, counseling, VD prevention, adoption, and other services.

16. Plaintiffs BAIRD and PARENTS AID SOCIETY are immediately affected by the requirements and sue on behalf of all other centers and administrators similarly affected on a regular and recurring basis.

17. Plaintiff GERALD ZUPNICK, M.D. is a duly licensed physician and medical director of the center.

18. Plaintiff DR. ZUPNICK is immediately affected by the parental consent law on a regular and recurring basis and sues on behalf of himself, his patients, other physicians similarly situated, and their patients.

19. The principal question of law is whether the parental consent requirement is unconstitutional in toto under the standards enunciated by *Roe* v. *Wade*, 410 U.S. 113 (1973), *Doe* v. *Bolton*, 410 U.S. 179 (1973), and *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), which question is common to the claims of all members of Plaintiffs' classes.

20. Questions of fact primarily relate to the existence, enforcement, and impact of the statute and are also common to the claims of all members of each class.

21. The named Plaintiffs are severely affected by the requirements and will fully and adequately protect the interests of other members of each class, who are too numerous to be named individually.

22. If individual members of Plaintiffs' classes sought varying types of relief in different jurisdictions, there would be a risk of inconsistent and irreconcilable results, which would subject both Plaintiffs and Defendants to incompatible and inconsistent standards of conduct.

23. A final judgment on the merits of Plaintiffs' claims would be fully dispositive of the claims and interests of others similarly situated who are not specifically named as Plaintiffs and would be the optimum mode of decision in terms of judicial efficiency and avoidance of piecemeal adjudication.

V. Statutory Provisions in Question.

24. "*Section 12P.* (1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian. . . ."

VI. Facts.

25. Plaintiff WILLIAM BAIRD is general director and chief counselor of a center operated by Plaintiff PARENTS AID SOCIETY, INC., for the purposes, inter alia, of providing contraception, abortion, counseling, VD, adoption, and other services.

26. Plaintiff MARY MOE I is sixteen years of age, in the tenth grade, and about nine weeks pregnant. She is seeking to terminate her pregnancy, and does not want to inform either of her parents.

27. Plaintiff MARY MOE II is seventeen years of age, in the twelfth grade, and about eight weeks pregnant. She is seeking to terminate her pregnancy, and does not want to inform either of her parents.

28. The statute in question prevents them from obtaining abortions without parental consent, and is thereby inflicting grave and irreparable injury upon them.

29. Plaintiff GERALD ZUPNICK, M.D. is a physician licensed to practice medicine in eight (8) states, including Massachusetts and New York. Dr. Zupnick is medical director of the center.

30. Plaintiff Bill Baird has for over ten years been a nationally prominent leader in the social movement to invalidate restrictions on abortion and birth control services in the United States. He was the successful party in the landmark case of *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972). He has lectured on hundreds of college and university campuses, been Clinical Director of Emko Co. (a contraceptive manufacturer), been a special advisor to the New York State Senate Committee on Health, and was founder of Parents Aid Society, the first non-profit abortion/birth control center in the United States.

31. Dr. Zupnick has extensive experience in providing abortion, contraception, and related services on an outpatient

basis, and has performed over 5,000 abortions in a non-hospital setting.

32. With Bill Baird as Administrator and Dr. Zupnick as Medical Director, Parents Aid Society, Inc. have endeavored to facilitate access with particular emphasis on helping the poor and very young.

33. The parental consent requirement, however, threatens the continued activities of Plaintiffs by imposing sanctions upon the treatment of minors without parental consent.

34. Such a restraint, unless enjoined, will operate to deny many women access to medical care and counseling.

35. Defendants are empowered to and will enforce the statute through civil and criminal sanctions.

36. Injunctive relief is necessary to prevent enforcement.

VIII. Judgment Requested.

(1) The parental consent requirement is invalid under the Due Process Clause of the Fourteenth Amendment after *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973).

(2) The parental consent requirement violates the Equal Protection Clause of the Fourteenth Amendment.

VIII. Judgement Requested.

WHEREFORE, PLAINTIFFS RESPECTFULLY REQUEST:

(1) A temporary restraining order prohibiting Defendants from enforcing or otherwise implementing the parental consent requirement of the new Massachusetts abortion law, Gen. Laws, Ch. 112, Sec. 12P.

(2) The convening of a statutory three-judge federal court.

(3) A declaratory judgment that the parental consent requirement violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment as interpreted by *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), and *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

(4) Preliminary and permanent injunctions prohibiting Defendants from enforcing or otherwise implementing the parental consent requirement.

(5) An order taxing all costs and reasonable attorneys' fees against Defendants, and granting Plaintiffs any other relief deemed necessary, just, or proper.

Respectfully submitted,

ROY LUCAS
1501 Watergate South
700 New Hampshire Avenue, N.W.
Washington, D.C. 20037
202-338-6955

JOAN SCHMIDT
27 State Street
Boston, Massachusetts 02109
617-523-7877

Attorneys for Plaintiffs.

Dated October 30, 1974.

VERIFICATION OF COMPLAINT BY PLAINTIFF WILLIAM BAIRD.

COMMONWEALTH OF MASSACHUSETTS:

WILLIAM BAIRD, being duly sworn, states:

1. I am a Plaintiff in this lawsuit individually and have been authorized to sue also on behalf of Parents Aid Society, Inc., a not-for-profit corporation of which I am President.

2. I have read the Complaint, and I certify that the factual allegations made therein are true and accurate to the best of my information and belief, and further that approximately 5-10 pregnant minors under the age of 18 seek abortions without parental consent each week at Parents Aid Society.

WILLIAM BAIRD

Subscribed and sworn to before me
this 29 day of October, 1974

JOAN C. SCHMIDT
Notary Public

My commission expires: 5/22/81

AFFIDAVIT OF _____.

_____, being duly sworn, makes this statement as her testimony and affidavit:

1) I am seventeen years of age, a student of the twelfth grade and about eight weeks pregnant. The first day of my last menstrual period was September 12, 1974, and I have had a positive pregnancy test.

2) I fully understand the options of continuing and terminating a pregnancy and I prefer the latter alternative because continued pregnancy would interfere with my education. I

have no present desire to be married and I do not want my parents to know about the pregnancy.

3) I have sought the help of Parents' Aid Society and I have been informed that, as of November 1, 1974, a minor must have the consent of both parties in order to have an abortion.

4) In light of the new Massachusetts Abortion Law, Chapter 706, I cannot attain medical care without parental consent and I have accordingly asked to be a plaintiff in a Federal Court Proceeding to have this restriction declared unconstitutional.

5) I have been promised that in no way will my name be revealed to anyone other than court officials.

MARY MOE II

Notary
JOAN C. SCHMIDT
Commission expires 5/22/81

AFFIDAVIT OF _____.

_____, being duly sworn, makes this statement as her testimony and affidavit:

1) I am sixteen years of age, a student of the tenth grade and about nine weeks pregnant. The first day of my last menstrual period was August 24, 1974, and I have had a positive pregnancy test.

2) I fully understand the options of continuing and terminating a pregnancy and I prefer the latter alternative because continued pregnancy would interfere with my education, I have no present desire to be married and I do not want my parents to know about the pregnancy.

3) I have sought the help of Parents' Aid Society and I have been informed that, as of November 1, 1974, a minor must have the consent of both parents in order to have an abortion.

4) In light of the new Massachusetts Abortion Law, Chapter 706, I cannot attain medical care without parental consent and I have accordingly asked to be a plaintiff in a Federal Court Proceeding to have this restriction declared unconstitutional.

5) I have been promised that in no way will my name be revealed to anyone other than court officials.

MARY MOE I

Notary

JOHN W. HEBB Notary Public
Comm. ex. 9-12-74.

United States District Court.
District of Massachusetts.

[Title omitted in printing.]

Application for Temporary Restraining Order.

Upon the Verified Complaint, supporting affidavits, exhibits, and Memorandum of Law, Plaintiffs respectfully move this Court for a temporary restraining order, in the form appended hereto, and in support of this application state:

1. Title 28, U.S. Code, sec. 2284(3), expressly authorizes a single district judge to "grant a temporary restraining order to prevent irreparable injury" in a case such as this, pending a

hearing and decision by a three-judge court. *See also* Fed. R. Civ. Proc. 65.

2. A temporary restraining order is necessary to protect the health of Mary Moe I & II by allowing them to obtain medical abortions without the threat of parental veto.

3. A temporary restraining order is necessary to preserve the status quo in the parental consent statute is new and an unprecendented restriction in this Commonwealth.

4. Plaintiffs have a substantial probability of success as shown more fully by the appended Memorandum of Law.

ROY LUCAS
Suite 1501
Watergate South
Washington, D.C. 20037

JOAN SCHMIDT
27 State Street
Boston, Massachusetts 02109
Attorneys for Plaintiffs.

AFFIDAVIT OF MOE III.

_____, being duly sworn, makes this statement as her testimony and affidavit:

1) I am seventeen years of age, unmarried, and have been living on public assistance for almost a year. The first day of my last normal menstrual period was approximately eight weeks ago, and I have had a positive pregnancy test.

2) I fully understand the options of continuing and terminating a pregnancy and I prefer the latter alternative because continued pregnancy would cause my children and I great hardship. I am the mother of a two month old infant and a

fifteen month old baby. Public assistance pays me one hundred and seventy-nine dollars a month. The rent, alone, is one hundred and thirty dollars a month, leaving me forty-nine dollars a month for the three of us or one dollar and sixty cents per day for each of us to live on. I hardly have enough money to pay for milk for the babies, and I am not financially, emotionally, or physically able to continue this unwanted pregnancy.

3) I have no present desire to be married and I do not want my parents to know about this pregnancy. My parents have told me that if I was to become pregnant again they would disown me. Because of their religious beliefs if I was to have an abortion, I believe that they would kill me.

4) My boyfriend has been told by his doctor that he was sterile, which is why I did not use birth control methods.

5) I have sought the help of Bill Baird of the Parents' Aid Society, and I have been informed that, as of November 1, 1974, a minor must have the consent of both parents in order to have an abortion. I understand that a temporary restraining order has been signed in the United States Federal Court, and that it may now be in jeopardy.

6) In light of the new Massachusetts abortion law, Chapter 706, if this restraining order is removed, I cannot attain medical care without parental consent and I have accordingly asked to be a plaintiff in a Federal Court Proceeding to have this restriction declared unconstitutional.

7) I have been promised that, in no way, will my name be revealed to anyone other than court officials.

Sworn before me Nov. 11, 1974.

DANIEL E. COLEMAN
Notary Public
My commission expires July 10, 1981

Affidavit of Moe IV.

_____, being duly sworn, makes this statement as her testimony and affidavit:

1) I am sixteen years of age, unmarried, a student of the eleventh grade and about eight weeks pregnant. The first day of my last menstrual period was about eight weeks ago, and I have had a positive pregnancy test.

2) I fully understand the options of continuing and terminating a pregnancy and I prefer the latter alternative because continued pregnancy would interfere with my education. I have no present desire to be married and I do not want my parents to know about my pregnancy.

3) I am one of nine children. I am Roman Catholic and my parents are also, but they are very opposed to abortion. I fear they would beat me as well as my boyfriend severely. I love my parents very much, but they would never understand and it would hurt them.

4) I believe this pregnancy if continued would ruin by entire life. If I am denied this abortion, or forced to go to my parents I am desperate enough to use any method however dangerous, to abort myself, including killing myself. Also, it would be impossible for me to keep secret my pregnancy from my other family members, and I fear being forced into a home for unwed mothers.

5) I have sought the help of Bill Baird of the Parents' Aid Society, and I have been informed that, as of November 1, 1974, a minor must have the consent of both parents in order to have an abortion. I understand that a temporary restraining order has been signed in the United States Federal Court, and that it may now be in jeopardy.

6) In light of the new Massachusetts abortion law, Chapter 706, if this restraining order is removed, I cannot attain medical care without parental consent and I have accordingly

asked to be a plaintiff in a Federal Court Proceeding to have this restriction declared unconstitutional.

7) I have been informed that I cannot obtain the abortion unless the restraining order remains in effect. I am fearful that the District Attorney might arrest me, my doctor, Bill Baird, Parents' Aid Society and staff unless the restraining order stays in effect.

8) I am also fearful of the possibility that the Attorney General's office might bring proceedings against me, my doctor, Bill Baird, Parents' Aid Society and staff unless the restraining order stays in effect.

9) I have been promised that, in no way, will my name be revealed to anyone other than court officials.

Sworn before me on November 12, 1974.

JOAN C. SCHMIDT
Notary Public
Commission expires 5/22/81

United States District Court.
District of Massachusetts.

[Title omitted in printing.]

Motion to Dismiss and/or for Summary Judgment and Motion for a More Definite Statement.

Defendants, pursuant to Rule 12 of the Federal Rules of Civil Procedure, move that the Complaint in the above-named case be dismissed (and/or for summary judgment) and that plaintiffs be ordered to file a more definite statement.

Defendants assign the following reasons in support of their motion to dismiss and/or for summary judgment under Rule 12(b):

1. The Complaint fails to state a claim upon which relief can be granted.
2. This Court lacks jurisdiction over the subject matter of the Complaint.
3. Plaintiffs have failed to join parties under Rule 19, particularly the parents of plaintiffs Mary Moe I and Mary Moe II.
4. Plaintiffs Mary Moe I and Mary Moe II are precluded from bringing this action on their own behalf by reason of Fed. R. Civ. P. 17(b), 17(c).
5. Plaintiffs lack standing to bring this action.
6. Plaintiffs' action is not "ripe" for judicial review.
7. This Court should abstain from deciding any issue in this case.

Defendants assign the following reasons in support of their motion for a more definite statement under Rule 12(e):

1. The Complaint fails to state any facts as to how defendants have acted to deprive any plaintiff of any constitutional right.
2. The Complaint fails to set forth any factual allegations concerning any alleged deprivation of plaintiffs' constitutional rights.

By their attorney,
KENNETH BEHAR
Assistant Attorney General

[Certificate of service omitted in printing.]

United States District Court.
For the District of Massachusetts.

[Title omitted in printing.]

Motion to Intervene as Defendants.

Now come KATHLEEN ROTH, of Hingham, Massachusetts, JOHN LALLY, JR., and PATRICIA A. LALLY, of Randolph, Massachusetts, FRANK GIBSON and ELIZABETH GIBSON of Marshfield, Massachusetts, MARY STANTON of Newton, Massachusetts, PAUL ALYWARD of Wellsley, Massachusetts, JOSEPH HEALY and CATHERINE HEALY of Wellsley, Massachusetts, JANE HUNDERWADEL of Hingham, Massachusetts, JEAN HEALY of Hingham, Massachusetts, RITA CALLAHAN, R.N., of Jamaica Plain, Massachusetts, and JERRIL WALSH, R.N., of Weymouth, Massachusetts, who are the parents of unmarried minor girls of childbearing age, JANE DOE, who is a resident and citizen of the Commonwealth of Massachusetts, and who is the parent of a pregnant unmarried minor girl, and move, pursuant to Rule 24 of the Federal Rules of Civil Procedure, to intervene in this action as defendants:

1) individually,

2) on behalf of a class of defendant-interveners who are the parents of unmarried minor girls of the childbearing age who are or may become pregnant,

3) as next friend of their unmarried minor daughters of childbearing age who are or may become pregnant,

4) on behalf of a class of defendant-interveners who are parents, guardians, and next friend of their unmarried minor daughters of childbearing age who are or may become pregnant,

in order to assert the defenses set forth in their proposed answer, of which a copy is hereto attached on the grounds that:

I

1. This action is an attempt to deny the movants their constitutional, common law, statutory and natural right as guardians of their children's health, safety and welfare without making them a party to this action.

2. The movants are so situated that the disposition of this action may, as a practical matter, impair or impede their interests as parents of unmarried minor girls of the childbearing age who are or may become pregnant.

3. The movants' interests in this action are not adequately represented by the present defendants because the present defendants' defense of G.L. c. 112, s. 12P relates only to whether it furthers a legitimate state interest, and the question of parental consent is defended by the defendants only in light of its furthering such a state interest; however, the movants, as parents, seek to defend the legitimacy of the parental consent provision of G.L. c. 112, s. 12P, not only because it furthers a legitimate state interest, but also because it is a codification of their constitutional, common law and natural rights as the primary guardians of their children.

ALLEGATIONS OF CLASS.

The movants seek to intervene as a class because they are representatives of and sue on behalf of all parents of unmar-

ried minor girls within the childbearing age who are or may become pregnant.

a) the class is so numerous that joinder of all members is impractical.

b) There are questions of law and fact common to the class which relate to a parents right to act as guardians of their children's health, safety and welfare.

c) The claims and defenses of the representative parties are typical of the claims and defenses of the class.

d) The representatives will fairly and adequately protect the interests of the class.

e) The prosecution of separate actions against individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair and impede their ability to protect their interests.

II

1. This action is an attempt to deny the movants' minor unmarried daughters of childbearing age who are or may become pregnant their constitutional, common law and natural right to parental guidance.

2. The disposition of this action may as a practical matter deprive the movants' minor unmarried daughters of childbearing age who are or may become pregnant their right to par-

ental guidance and the movants therefore seek to intervene as next friend to protect the right of such children to parental guidance.

3. The movants' interest in this action, as next friends of their children, is not adequately represented by the defendants because the defendants' defense relates only to the question of whether G.L., c. 112, s. 12P, furthers a legitimate state interest. The movants, however, seek to defend the legitimacy of the parental consent provision of G.L., c. 112, s. 12P, not only because it furthers a legitimate state interest but also because it is a codification of their children's constitutional, common law and natural right to parental guidance.

ALLEGATIONS OF CLASS.

The movants seek to intervene as a class because they are representative of and sue on behalf of all parents, guardians and as next friend of their minor unmarried daughters within the childbearing age who are or may become pregnant.

a) The class is so numerous that joinder of all members is impractical.

b) There are questions of law and fact common to the class concerning the rights to parental guidance.

c) The claims and defenses of the representative parties are typical of the claims and defenses of the class.

d) The representatives will fairly and adequately protect the interests of the class.

e) The prosecution or defense of separate actions against individual members of the class would create a

risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

Respectfully submitted,

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51-53 St. Rose Street
Boston, Massachusetts 02130
524-2891

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723-4700 ext. 456

Attorneys for Applicants
for Intervention.

MARY LAURA RUSSELL
Legal Assistant
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Boston, Massachusetts 02108
523-3240

United States District Court
For the District of Massachusetts

[Title omitted in printing.]

Defendant-Interveners' Answer and Counterclaim.

Now come KATHLEEN ROTH of Hingham, Massachusetts, JOHN LALLY, JR., and PATRICIA A. LALLY of Randolph, Massachusetts, FRANK GIBSON and ELIZABETH GIBSON of Marshfield, Massachusetts, MARY STANTON of Newton, Massachusetts, PAUL ALYWARD of Wellsley, Massachusetts, JOSEPH HEALY and CATHERINE HEALY of Wellsley, Massachusetts, JANE HUNDERWADEL of Hingham, Massachusetts, RITA CALLAHAN, R.N., of Jamaica Plain, Massachusetts and JERRIL WALSH, R.N., of Weymouth, Massachusetts, who are the parents of unmarried minor girls of the childbearing age, and JANE DOE, who is a resident and citizen of the Commonwealth of Massachusetts, and who is the parent of a pregnant unmarried minor girl and submit this answer and counterclaim:

1) individually,

2) on behalf of a class of defendant-interveners who are the parents of unmarried minor girls of the childbearing age who are or may become pregnant,

3) as next friend of their unmarried minor daughters of childbearing age who are or may become pregnant,

4) on behalf of a class of defendant-interveners who are parents, guardians, and next friend of their unmarried minor daughters of childbearing age who are or may become pregnant.

ALLEGATIONS OF CLASS.

I

The defendant-interveners are representative of and sue on behalf of all parents of unmarried minor girls within the childbearing age who are or may become pregnant.

a) The class is so numerous that joinder of all members is impractical.

b) There are questions of law and fact common to the class which relate to a parents right to act as guardians of their children's health, safety and welfare.

c) The claims and defenses of the representative parties are typical of the claims and defenses of the class.

d) The representatives will fairly and adequately protect the interests of the class.

e) The prosecution of separate actions against individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

II

The defendant-interveners are representative of and sue on behalf of all parents, guardians and as next of friend of their

minor unmarried daughters within the childbearing age who are or may become pregnant.

a) The class is so numerous that joinder of all members is impractical.

b) There are questions of law and fact common to the class concerning the right to parental guidance.

c) The claims and defenses of the representative parties are typical of the claims and defenses of the class.

d) The representatives will fairly and adequately protect the interests of the class.

e) The prosecution of separate actions against individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

First Defense.

The complaint fails to state a claim upon which relief can be granted.

Second Defense.

Defendant-interveners deny that plaintiffs, WILLIAM BAIRD, GERALD ZUPNICK, M.D., and PARENT'S AID SOCIETY, INC., having standing to bring this action because their interest in G.L., c. 112, s. 12P, is secondary and indirect, and they are, therefore, improper parties to the action.

Third Defense.

Defendant-interveners deny that Plaintiffs, MARY MOE I and MARY MOE II, have capacity to bring this action in their own behalf by reason of Rule 17 (b) of the Federal Rules of Civil Procedure, because by their affidavits attached to the plaintiffs' complaint they admit that they are infants in the eyes of the law.

Fourth Defense.

Defendant-interveners deny that Plaintiffs, WILLIAM BAIRD, GERALD ZUPNICK, M.D., and PARENT'S AID SOCIETY, INC., are proper parties to sue on behalf of MARY MOE I and MARY MOE II and further assert that their parents as next friend are necessary parties to this action under Rule 19 of the Federal Rules of Civil Procedure.

Fifth Defense.

Defendant-interveners deny that the persons whom the plaintiffs purport to represent as a class do in fact constitute a single class and deny that the members of the class are properly and fairly represented by the plaintiffs and further allege the interests of the Plaintiffs, WILLIAM BAIRD, GERALD ZUPNICK, M.D., and PARENT'S AID SOCIETY, INC., who are the sellers of a service to wit, abortions, are in conflict with their potential buyers, plaintiffs, MARY MOE I and MARY MOE II, and all others similarly situated.

Sixth Defense.

Defendant-interveners deny that plaintiffs, MARY MOE I and MARY MOE II, will fairly and adequately protect the

interests of the class they allege to represent and further state that such inadequacy is demonstrated by the fact that they are represented by the same legal counsel as plaintiffs, WILLIAM BAIRD, GERALD ZUPNICK, M.D., and PARENTS AID SOCIETY, INC., who have interests adverse to plaintiffs, MARY MOE I and MARY MOE II.

Seventh Defense.

The defendant-interveners deny that this action is ripe for adjudication and thus there is no case and controversy because plaintiffs, MARY MOE I and MARY MOE II, have neither been denied their parents consent to obtain an abortion, nor is it alleged that they have attempted to obtain, or been denied, such consent by a judge of the Superior Court pursuant to the terms of G.L.. c. 112, s. 12P.

Eighth Defense.

The defendant-interveners further deny that this action is ripe for adjudication and thus there is no case or controversy because plaintiffs, WILLIAM BAIRD, GERALD ZUPNICK, M.D., and PARENTS AID SOCIETY, INC., have not alleged that their services have been sought by an unmarried minor girl who has been refused her parents consent to have an abortion.

Ninth Defense.

Defendant-interveners deny that plaintiffs, MARY MOE I and MARY MOE II, as unmarried minors, have a constitutional right to have an abortion without their parents consent and assert that the defendants-interveners have a constitutional, common law and natural right to provide guidance to their

unmarried minor girls and further assert that the defendant-interveners' unmarried minor girls have a constitutional, common law and natural right to parental guidance.

Tenth Defense.

Defendant-interveners deny that plaintiffs, WILLIAM BAIRD, GERALD ZUPNICK, M.D., and PARENTS AID SOCIETY, INC., have a constitutional right to perform abortions and assert that defendant-interveners have a constitutional, common law and natural right to provide guidance to their unmarried minor girls and further assert that the defendant-interveners' unmarried minor girls have a constitutional, common law and natural right to parental guidance.

Eleventh Defense.

1. The defendant-interveners deny the allegations in Paragraph 1 of the plaintiffs' complaint insofar as they assert that the G.L., c. 112, s. 12P, is enforced by defendants.

2. The defendant-interveners deny the allegations in Paragraph 2 of the plaintiffs' complaint and assert that the plaintiffs, MARY MOE I and MARY MOE II, have not attempted to obtain an abortion pursuant to G.L., c. 112, s. 12P.

3. The defendant-interveners deny the allegations in Paragraph 3 of the plaintiffs' complaint and assert that G.L., c. 112, s. 12P, does not deny access to medical abortions but rather prescribes a procedure which insures an informed consent, and further assert that unmarried minors in the Commonwealth of Massachusetts must obtain parental consent for medical procedures.

4. The defendant-interveners neither admit nor deny the allegations contained in Paragraph 4 and call upon the plaintiffs to prove the same if material.

5. The defendant-interveners deny the allegations contained in Paragraph 5 of the plaintiffs' complaint.

6. The defendant-interveners deny the allegations contained in Paragraph 6 of the plaintiffs' complaint.

7. The defendant-interveners admit the allegations contained in Paragraph 7 of the plaintiffs' complaint.

8. The defendant-interveners have no knowledge of the truth or falsity of facts alleged in Paragraph 8 of the plaintiffs' complaint.

9. The defendant-interveners have no knowledge of the truth or falsity of facts alleged in Paragraph 9 of the plaintiffs' complaint.

10. The defendant-interveners have no knowledge of the truth or falsity of facts alleged in Paragraph 10 of the plaintiffs' complaint.

11. The defendant-interveners have no knowledge of the truth or falsity of facts alleged in Paragraph 11 of the plaintiffs' complaint.

12. The defendant-interveners admit the allegations contained in Paragraph 12 of the plaintiffs' complaint.

13. The defendant-interveners deny the allegations contained in Paragraph 13 of the plaintiffs' complaint and assert that the interests of plaintiffs, WILLIAM BAIRD, GERALD ZUPNICK, M.D., and PARENTS AID SOCIETY, INC., as sellers of a service, to wit, abortions, are in conflict with their potential buyers, plaintiffs, MARY MOE I and MARY MOE II, and thus are not representative of one class.

14. The defendant-interveners deny the allegations contained in Paragraph 14 of the plaintiffs' complaint and assert that plaintiffs, MARY MOE I and MARY MOE II, by their own affidavits admit that they have not sought their parents' consent pursuant to G.L., c. 112, 12P, and thus by their own actions they are prevented from obtaining an abortion.

15. The defendant-interveners neither admit nor deny the allegations contained in Paragraph 15 of the plaintiffs' complaint and call upon the plaintiffs to prove the same if material.

16. The defendant-interveners deny the allegations contained in Paragraph 16 of the plaintiffs' complaint, and assert that plaintiffs, WILLIAM BAIRD and PARENTS AID SOCIETY, INC., are only secondary and indirectly affected by G.L., c. 112, s. 12P, and further call upon PARENTS AID SOCIETY, INC., to prove that they are licensed by the Department of Public Health and other appropriate agencies to perform abortions.

17. The defendant-interveners neither admit nor deny the allegations contained in Paragraph 17 of the plaintiffs' complaint and call upon the plaintiffs to prove the same if material.

18. The defendant-interveners deny the allegations contained in Paragraph 18 of the plaintiffs' complaint, and assert that said plaintiff is only secondarily and indirectly affected by G.L., c. 112, s. 12P.

19. The defendant-interveners deny the allegations in Paragraph 19 of the plaintiffs' complaint and assert that the questions are:

a) whether G.L. c. 112, s. 12P, furthers a legitimate state interest,

b) whether parents have a constitutional, common law and natural right to protect the health, safety and welfare of their unmarried minor children of childbearing age who are or may become pregnant, and

c) whether such children may be denied their right to parental guidance,

and further assert that these questions are not common to all members of plaintiffs' classes due to the adverse interests of plaintiffs.

20. The defendant-interveners deny the allegations contained in Paragraph 20 of the plaintiffs' complaint.

21. The defendant-interveners deny the allegations contained in Paragraph 21 of the plaintiffs' complaint, and assert that the interests of plaintiffs, WILLIAM BAIRD, GERALD ZUPNICK, M.D., and PARENTS AID SOCIETY, INC., who are the sellers of a service, to wit, abortions, are in conflict with their potential buyers, plaintiffs, MARY MOE I and MARY MOE II, and all others similarly situated.

22. The defendant-interveners deny the allegations contained in Paragraph 22 of the plaintiffs' complaint.

23. The defendant-interveners deny the allegations contained in Paragraph 23 of the plaintiffs' complaint.

24. The defendant-interveners admit the allegations contained in Paragraph 24 of the plaintiffs' complaint.

25. The defendant-interveners neither admit nor deny the allegations contained in Paragraph 25 of the plaintiffs' complaint and call upon the plaintiffs to prove the same if material.

26. The defendant-interveners neither admit nor deny the allegations contained in Paragraph 26 of the plaintiffs' complaint and call upon the plaintiffs to prove the same if material.

27. The defendant-interveners neither admit nor deny the allegations contained in Paragraph 27 of the plaintiffs' complaint and call upon the plaintiffs to prove the same if material.

28. The defendant-interveners deny the allegations contained in Paragraph 28 of the plaintiffs' complaint, and assert that under the provisions of G.L., c. 112, s. 12P, an abortion

may be obtained without parental consent by obtaining an order of a judge of the Superior Court.

29. The defendant-interveners neither admit nor deny the allegations contained in Paragraph 29 of the plaintiffs' complaint and call upon the plaintiffs to prove the same if material.

30. The defendant-interveners neither admit nor deny the allegations contained in Paragraph 30 of the plaintiffs' complaint and call upon the plaintiffs to prove the same if material, and question the relevance of the allegations asserted therein.

31. The defendant-interveners neither admit nor deny the allegations contained in Paragraph 31 of the plaintiffs' complaint and call upon the plaintiffs to prove the same if material.

32. The defendant-interveners deny the allegations contained in Paragraph 32 of the plaintiffs' complaint and call upon the plaintiffs to prove the same if material, and question whether the sole purpose of PARENTS AID SOCIETY, INC., is purely charitable in light of Paragraph 4 of its Articles of Organization, which are annexed hereto as Exhibit A, which in essence permit conflict of interest contracts by a director or officer of the corporation.

33. The defendant-interveners deny the allegations contained in Paragraph 33 of the plaintiffs' complaint.

34. The defendant-interveners deny the allegations contained in Paragraph 34 of the plaintiffs' complaint, and assert that G.L., ch. 112, s. 12P, applies only to unmarried minor girls and further assert that such girls may obtain an abortion without parental consent under the provisions of the statute.

35. The defendant-interveners deny the allegations contained in Paragraph 35 of the plaintiffs' complaint.

36. The defendant-interveners deny the allegations in Paragraph 36 of the plaintiffs' complaint.

WHEREFORE, the defendant-interveners, and each of them, demand judgment, dismissing the plaintiffs' complaint, with costs, and reasonable counsel fees.

Counterclaims of Defendant-Interveners.

First Counterclaim.

Defendant-interveners assert that the plaintiffs are directly interfering with their right of privacy, by attempting to divide the family unit and engage in medical operations upon their daughters without their consent.

Second Counterclaim.

Defendant-interveners assert that the plaintiffs are interfering with their constitutional, common law and natural right to provide parental guidance to their minor unmarried daughters.

Third Counterclaim.

Defendant-interveners, as parents, guardians and next friend to their minor daughters assert that the plaintiffs are intefering with their children's constitutional, common law and natural right to parental guidance.

WHEREFORE, defendant-interveners demand judgment for costs and attorneys fees incurred.

Respectfully submitted,

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524-2891

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Suite 524
40 Court Street
Boston, Massachusetts 02108
723-4700 ext. 456

Attorneys for Defendant-interveners.

MARY LAURA RUSSELL
Legal Assistant
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40 Court Street
Boston, Massachusetts 02108
523-3240

United States District Court.
District of Massachusetts.

[Title omitted in printing.]

Motion to Join All District Attorneys in Commonwealth as Members of Defendant Class and To Extend Injunctive Restraints to All Said Defendants.

Plaintiffs respectfully move this Court to join all of the District Attorneys in the Commonwealth as party defendants and to extend the temporary restraining order and a preliminary injunction against all said Defendants. In support of this motion Plaintiffs state:

1. This is a civil action by an abortion center director, medical director, and four previously pregnant minor patients all suing as representatives of their respective classes, to declare invalid and enjoin enforcement of the parental consent requirement of the Massachusetts abortion law, Mass. Gen. Laws, ch. 112, Sec. 12P.

2. The provision in question is enforced by the Attorney General pursuant to Sec. 12R.

3. The District Attorneys may enforce Sec. 12P, which is incorporated by reference into Sec. 12N(1). Sec. 12 Q imposes fines from one hundred to two thousand dollars for violations of Sec. 12N.

4. At present only one District Attorney is a named Defendant.

5. The other eight District Attorneys in the Commonwealth are as follows:

George G. Burke
D.A. for Norfolk County

Philip A. Rollins
D.A. for Barnstable, Bristol, Dukes, and Nantucket Counties

Matthew J. Ryan, Jr.
D.A. for Berkshire and Hampden Counties

John P.S. Burke
D.A. for Essex County

John M. Callahan
D.A. for Hampshire County

John J. Droney
D.A. for Middlesex County

A. Stanley Littlefield
D.A. for Plymouth County

William T. Buckley
D.A. for Worcester County

6. At present these District Attorneys are not restrained by order of this Court.

7. The Class of Mary Moes and the class of physicians affected by the statute is statewide.

8. Injunctive relief against all district attorneys is necessary to protect the rights of all pregnant minors, physicians, hospital and abortion center personnel throughout the Commonwealth.

9. Plaintiffs have established through inquiry and allege on information and belief that many hospitals, abortion centers, and district attorneys outside of Suffolk County do not regard themselves as protected or bound by the orders of this Court until made effective statewide.

WHEREFORE, pursuant to Fed. R. Civ. Proc. 19-21, Plaintiffs respectfully move this Court to join all of the remaining district attorneys in the Commonwealth as parties defendant and to extend all orders of this Court to said parties.

Respectfully submitted:
ROY LUCAS
Suite 250
Federal Bar Building
1819 H Street, N. W.
Washington, D. C. 20006

JOAN SCHMIDT
27 State Street
Boston, Massachusetts 02109
Attorneys for Plaintiffs.

Motion to Certify Plaintiffs' Classes.

Plaintiffs respectfully move this Court, pursuant to Fed. R. Civ. P. 23(c), to certify the plaintiffs as representatives of their respective classes. In support of this motion Plaintiffs state:

1. Mary Moe I-IV, at the time of filing, were and under *Roe* v. *Wade*, 410 U.S. 113, 124 (1973), remain, representative of the class of pregnant minors capable of and willing to give informed consent to an abortion, but who decline to seek the consent of both parents required by Mass. Gen. Laws, ch. 112, Sec. 12P.

2. Plaintiffs William Baird and Parents Aid Society, Inc., are representative of all abortion centers and their administrators in the Commonwealth, who, on a regular and recurring basis, must deal with pregnant minors.

3. Dr. Zupnick, too, is representative of all physicians in the Commonwealth who see minor patients seeking abortions without parental consent.

4. A class action with regard to each class is proper because the requirements of Rule 23 are all fully met.

WHEREFORE, Plaintiffs respectfully move this Court to enter an order certifying this case as a class action.

Respectfully submitted:

ROY LUCAS
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1819 H Street, N.W.
Washington, D.C. 20006
JOAN SCHMIDT
27 State Street
Boston, Massachusetts 02109
Attorneys for Plaintiffs.

[Titles omitted in printing.]

Request for Disclosure.

In light of the fact that plaintiffs plan to call Mary Moe I and Mary Moe III, who are anonymous plaintiffs in the above-entitled action, interveners request that the plaintiffs disclose the following information regarding their true identity:

1. Name
2. Address
3. Date of birth
4. Place of birth.

This information is necessary in order to provide the interveners an opportunity to properly cross-examine the testimony of Mary Moe I and Mary Moe III.

By their attorney,
BRIAN A. RILEY.

United States District Court
District of Massachusetts.

WILLIAM BAIRD: MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,
PLAINTIFFS,

v.

FRANCIS BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,
DEFENDANTS,

JANE HUNERWADEL, for herself and all others similarly situated,
DEFENDANT-INTERVENOR

Substitute Order.

Inadvertencies in the order entered April 28, 1975 are hereby corrected by substituting therefor the following order as of April 28, 1975, nunc pro tunc.

In accordance with our opinion of April 28, 1975, Section 12P of Mass. G.L. c. 112, and such other portions of the chapter insofar as they make specific reference thereto are hereby declared to be unconstitutional and void, and defendants are enjoined from enforcement thereof.

BAILEY ALDRICH
U.S. Circuit Judge
FRANK H. FRIEDMAN
U.S. District Judge

May 9, 1975

United States District Court.
District of Massachusetts.

[Title omitted in printing.]

Transcript of Testimony.

DECEMBER 7, 1974.

. . . . . .

[13] MR. LUCAS: We are prepared to call our first expert witness.

JUDGE ALDRICH: Go ahead.

MR. LUCAS: Dr. Somers Sturgis.

SOMERS H. STURGIS, Sworn
Direct Examination by Mr. Lucas

Q. Would you state your name and address, please, sir?

A Somers H. Sturgis, 47 Raymond Street, Cambridge, Mass.

Q What is your current position?

A At present I am emeritus professor at Harvard in gynecology and I am a consultant in gynecology to a local university health service.

Q Are you licensed to practice medicine in the Commonwealth of Massachusetts?

A Yes.

Q I would like to show you your curriculum vitae and ask you to identify it.

MR. LUCAS: Let me first show it to the defendants.

JUDGE ALDRICH: Doctor, this is a large courtroom. Quite apart from the persons in the back [14] of the courtroom who may not be able to hear you, we cannot hear you.

Mr. Lucas, we have the same problem with you and even more so because the doctor has a microphone and you don't.

MR. LUCAS: I ask the Clerk to mark this Exhibit 1.

(Curriculum vitae of Dr. Somers H. Sturgis marked Plaintiffs' Exhibit 1 for Identification.)

Q Would you tell the Court what Exhibit 1 is, Dr. Sturgis?

A This is my curriculum vitae giving my appointments, my background and experience and my professional qualifications, together with the societies, medical and other, that I belong to, and a list of some 145 publications that are in the medical literature.

Q Have you specialized in any particular field during your career?

A Since the war I have been in gynecology, having been trained originally as a surgeon, general surgeon, and after the war I concentrated in gynecology entirely for the last 30 years, since 1945.

JUDGE FREEDMAN: May I ask you, Doctor, which war you are referring to, since we have had [15] nothing but wars of late?

THE WITNESS: The Second World War.

Q Are you a member of any national gynecological organizations?

A I am a member of a good many national as well as local organizations. I am a diplomate of the American Board of Obstetrics and Gynecology, as well as surgery, and a member of the American Gynecological Society, as well as surgical societies but most of them gynecological and obstetrical.

Q Would you describe the extent of your clinical experience in gynecology over the years?

A I have been in practice for — well, it comes to 19 years since I got back from World War II, and in that time I have been rather more interested in the emotional side of gynecology, particularly in young people, in adolescents. In 1950 I was asked by Dr. Roswell Gallagher to be the gynecological consultant to the first Adolescent Clinic in this country. Dr. Gallagher set up this first clinic devoted entirely to adolescents at the Children's Hospital, the Children's Medical Center now, in 1950, and from that time on I have been gynecological consultant to this adolescent group — this has been not only in my private practice but with the [16] Children's Medical Center, as well as the fact that I am now consultant to a college age group, that is from 16 or 17 to 19 or 20, locally, a college group at a neighboring university.

Q Are you familiar with the prevailing national and local standards of acceptable medical practice in the gynecology field?

A I certainly am, having been a member of many national societies, and of course receiving the bulletins from the College of Obstetrics and Gynecology, as well as other journals devoted to this specialty.

Q Have you been involved in the promulgation of any of these standards by the national society, the American College of Obstetricians and Gynecologists?

A Yes. I was a member of a committee of the American College of Obstetricians and Gynecologists back in 1968. This was a subcommittee for the Committee on Life, Education and Behavior of the College. This numbered nurses, doctors and social workers. It was a behavioral group. This subcommittee was asked to bring recommendations to the College concerning certain sexual problems, particularly in young people.

Q There are two statements in one report. I would [17] like to ask you to identify them.

MR. LUCAS: First, I will show them to counsel for the defendants. I would like to have this marked as Exhibit 2 and this one as Exhibit 3, and this statement marked Exhibit 4.

(Statement of American College of Obstetrics and Gynecology, dated February 10, 1973, and amended June, 1974, marked Plaintiffs' Exhibit 2 for Identification.)

(Statement of American College of Obstetrics and Gynecology, dated April 10, 1973, marked Plaintiffs' Exhibit 3 for Identification.)

(Statement submitted to Executive Board of the American College of Obstetrics and Gynecology re Sexual Crises in the Minor Girl marked Plaintiffs' Exhibit 4 for Identification.)

Q Dr. Sturgis, could you identify for the Court these exhibits?

JUDGE ALDRICH: Do you have objection?

MR. BEHAR: I would like the record to show we are not acquiescing in the introduction of these as exhibits. They are marked for identification, as I understand it, and have not been incorporated as exhibits.

JUDGE ALDRICH: It will be understood they are all marked for identification at this time except No. 1.

[18] Q Would you identify them as 2 through 4, please?

A Exhibit 2 is a statement by the American College of Obstetrics and Gynecology. This is dated February 10, 1973, and was amended June, 1974. This is a statement of policy.

Exhibit 3 is again a statement by the American College of Obstetrics and Gynecology on the unmarried mother. This is again a policy statement. It has a date of April 10, 1970.

The fourth exhibit, No. 4, is a statement submitted to the Executive Board of the American College of Obstetrics and Gynecology by the subcommittee that I mentioned, of which I was a member, concerning sexual crises in the minor girl, in which our committee took up venereal disease in the minor girl, how it is to be handled by the profession or suggesting how it be handled, plus abortion, plus emotional crises of a sexual nature. Those three issues were taken up by this committee in Exhibit 4.

Q Was Exhibit 2 approved by the entire American College of Obstetrics and Gynecology?

A Yes. Exhibit 2 is a College statement on abortion.

Q Is Exhibit 3 also a College statement?

A That is correct.

Q And what branch of ACOG approved Exhibit 4, the [19] entire College or the committee?

A The College published our statement, Exhibit 4, in the monthly bulletin, although it had not been at that time accepted by the Executive Committee of the College as a policy.

Q Is there anything in Exhibit 2, Statement on Abortion, which mandates parental consent for minors under age 18?

A There is nothing at all in there on that score.

Q Is there any recommendation or provision in Exhibit 3 which mandates parental consent for minors under 18?

A No, sir, there is not.

Q Is there any recommendation which mandates parental consent in Exhibit 4?

A This is something that is taken up in Exhibit 4, in three pages, and that is very much my concern, and I would like to, if I may, answer that in this way. We recognize that an unwanted pregnancy —

MR. REYNOLDS: Objection. He has answered the question.

JUDGE ALDRICH: I can't hear you.

MR. REYNOLDS: He has already answered the question that was asked him.

JUDGE ALDRICH: Would you identify [20] yourself?

MR. REYNOLDS: Robert J. Reynolds.

JUDGE ALDRICH: And you appear for whom?

MR. REYNOLDS: The intervenors, sir.

JUDGE ALDRICH: You haven't been allowed to intervene.

MR. REYNOLDS: I beg the Court's pardon.

MR. BEHAR: Your Honor, may I request clarification?

JUDGE ALDRICH: Excuse me. You have been allowed to intervene.

MR. REYNOLDS: I thought I was.

JUDGE ALDRICH: The motion to exclude you has not been allowed. I beg your pardon. You may proceed.

MR. REYNOLDS: May I have a ruling on my objection, if your Honor please.

JUDGE FREEDMAN: What is the basis for your objection?

MR. REYNOLDS: That he has already answered the question that was asked him.

He said he would like to tell more about this.

JUDGE ALDRICH: All right. Ask him if he would like to tell more about it.

[21] Q Would you describe the contents and findings in Exhibit 4?

A Yes, sir. I would like to say that we considered in the committee the fact that an unwanted pregnancy is sometimes a social and emotional tragedy to an adult and that when the mother herself is a child it is even worse. The adult, now woman, has received the privilege of the option of terminating pregnancy, yet the minor, the child, is in a much more serious predicament.

We faced this from the point of view of the surgeon or gynecologist when a minor child comes to him for termination of pregnancy but refuses to let her parents know, and this is an extremely serious dilemma for the medical profession, and we felt that there were only three possible answers that he could give.

One would be to refuse this child, not to do anything at all, and to send her along. Another would be to tell her parents in spite of the fact she says she would not allow this. And the third would be to try to give her whatever medical resolution of the problem might be right.

We felt that the first situation was perhaps the worst – to send this child away without [22] any help at all, in which case certainly if she had gone to an illegal abortionist and had severe complications or even death the doctor who sent her away might indeed find himself responsible for that. We felt —

MR. REYNOLDS: May I enter an objection, if your Honor please. The witness was simply asked to identify this document at this time.

JUDGE ALDRICH: Well, in this instance he is talking about Exhibit 4 which is, as I understood it, a report from a committee that he was a member of.

MR. REYNOLDS: That is correct, sir. What we are doing, as I understand it, at this time is simply identifying the document.

JUDGE ALDRICH: You would rather he gave his personal opinion rather than the opinion of the committee?

MR. REYNOLDS: That is one ground for my objection. It is my understanding that we are simply identifying these documents which have been marked for identification and not as exhibits. I want to object to each and every one of them.

JUDGE ALDRICH: I can understand that you want to object to the introduction of this as an [23] exhibit. Why don't we pass on the admissibility of all three exhibits?

MR. LUCAS: Exhibit 1 I should formally move admission of.

JUDGE ALDRICH: Exhibit 2.

MR. LUCAS: I would like to move the admission of Exhibit 2 as an accurate copy of the Statement on Abortion of the American College of Obstetricians and Gynecologists.

JUDGE ALDRICH: It is received.

It would save time if we had three copies.

MR. LUCAS: I think we have some extra copies.

JUDGE FREEDMAN: These are copies of a statement from the American College of Obstetricians Gynecologists of which, Doctor, you are a member of a subcommittee.

THE WITNESS: Correct.

JUDGE FREEDMAN: Have you participated in the authorship of any of these statements?

THE WITNESS: On Exhibit 4, I was one of the authors, yes.

JUDGE ALDRICH: Would you state your grounds, counsel, for objection?

MR. BEHAR: This witness, I believe —

[24] JUDGE ALDRICH: We are talking about Exhibit 2.

MR. BEHAR: Well, as far as both 2 and 3 go, he has not authored them. He has testified they do not concern minors, and so in our view they are irrelevant. We submit they are hearsay.

JUDGE ALDRICH: Well, I suppose if you wish to press the hearsay argument that they are not identified, there would be some initial trouble right there.

MR. BEHAR: My point is that we cannot question the guide lines.

JUDGE ALDRICH: You do not mean that they have not been identified as a statement of the American College but your hearsay argument went deeper than that.

MR. BEHAR: Yes, your Honor.

JUDGE ALDRICH: Do you object to the identification?

MR. BEHAR: I accept that he has identified these as statements of the American College but that is the limit to what I acknowledge.

MR. LUCAS: We are offering them as such, as evidence of prevailing medical standards, as some evidence of prevailing medical standards.

[25] JUDGE ALDRICH: What do you say to the fact that they do not deal with minors?

MR. LUCAS: The fact that they do not advocate parental consent would tend to show that parental consent was not medically justifiable, and we will question the witness in more detail on that.

JUDGE ALDRICH: Where is the reference to parental consent?

MR. LUCAS: In the Statement on Abortion there is none.

JUDGE ALDRICH: How do we know it relates to minors?

MR. LUCAS: We would say that the absence of any reference — you see the Statement on Abortion has certain requirements and certain restrictions which does not include the restriction on requiring parental consent. This was one way in which the Supreme Court used various standards in Roe v. Wade and Doe v. Bolton, the absence of parental consent in the Modern Penal Code and the Uniform Abortion Act, we feel would be evidence of lack of medical basis for requiring this. Both Exhibits 2 and 3 are useful as medical background to the subject matter and would be useful in that regard.

JUDGE ALDRICH: We can have that direct [26] from the witness. Exhibits 2 and 3 are excluded.

Q Dr. Sturgis, would you describe —

JUDGE ALDRICH: We are considering Exhibit 4.

MR. LUCAS: I am sorry.

JUDGE ALDRICH: Exhibit 4 will be received limited to the statement being the doctor's own views.

MR. REYNOLDS: May I be heard on that, your Honor? I do not have a copy of Exhibit 4.

JUDGE ALDRICH: I thought it was passed to counsel.

MR. REYNOLDS: It was passed and taken back.

JUDGE ALDRICH: Please take a look at it. I might suggest to you, counsel, that it will save time to put in the document rather than ask individual questions. You are going to have plenty of opportunity for cross examination.

MR. REYNOLDS: If your Honor please, my point was that if the doctor is going to be using this as his testimony it would be helpful if I had a copy in front of me.

JUDGE ALDRICH: I agree with that. But you would not have a copy of his testimony if he [27] testified without it.

MR. REYNOLDS: No, sir, I would not.

JUDGE ALDRICH: Therefore, I overrule the objection.

MR. REYNOLDS: Kindly note my objection to the ruling, your Honor.

JUDGE ALDRICH: You don't have to note your objection in this Court.

MR. REYNOLDS: May I inquire which portions of this exhibit would be accepted?

JUDGE ALDRICH: We understood this was a statement the witness subscribed to and we were receiving it as a recitation of his personal views.

MR. REYNOLDS: May the record show I object to the introduction of it.

Q Dr. Sturgis, would you describe what your findings were in your work on this committee, that is, Exhibit 4?

A The conclusions there of the subcommittee to which I agree were that, first, the minor who is pregnant and refused to tell her parents should be urged as far as possible to bring the parents into the situation since, of course, all minors have a certain degree of financial and emotional dependence on their parents. However, if this was completely [28] impossible, and if the child was adamant in her refusal that puts the doctor into a very different predicament, and we felt that to send the child away without helping her at all was the worst choice, and that to betray her confidence and say, "All right. I'm going to tell your parents on you," was just as much a violation of confidentiality that a lawyer might find himself in with his client, and this was unacceptable to us.

The third possibility then remained, that we should try to consider the medical predicament and the medical reasons for interruption of this minor and use our judgment then concerning her maturity and development, recognizing, I think, that age is no criterion of development and maturity, that each individual must be judged by the doctor, by the man most qualified perhaps to judge the degree of maturity and responsibility as well as the medical need for help.

Q Could you describe to the Court what has been the extent of your experience with minor patients under age 18 who are pregnant, the experience which you personally have had or supervised?

JUDGE JULIAN: I would ask that your testimony be divided into a group of young women [29] between the ages of 16 and 18 and a group of young women between the ages of about 12, when conception becomes possible, and 16.

THE WITNESS: I will try to do so, your Honor, although I do not have a breakdown in statistics. I have been closely allied to a clinic in a neighborhood of Boston where legal

abortions are done after proper counselling and concern, and I think in this clinic we see around 10 percent of our clients under 18 probably and three-quarters of them over 15.

JUDGE JULIAN: Under 16?

THE WITNESS: Under 16, yes.

JUDGE JULIAN: The reason I ask is under Massachusetts law carnal knowledge of a girl under the age of 16 constitutes a felony punishable by a sentence up to life imprisonment.

THE WITNESS: Of course, according to the present law —

JUDGE JULIAN: I am referring to a girl under the age of 16 who is the victim of statutory rape.

THE WITNESS: We do have, of course, numbers of girls under 16, and they must come in with one or the other parent who signs a release.

[30] JUDGE JULIAN: Under what circumstances is that required?

THE WITNESS: I believe it is required under the law of Massachusetts.

JUDGE JULIAN: Under what circumstances would the doctor require the signature of a parent?

THE WITNESS: For any minor under 18.

JUDGE JULIAN: Under 18?

THE WITNESS: Yes. That is in our clinic — I believe that is what is understood.

MR. LUCAS: That clinic is not in this County. The District Attorney from that County has not yet been joined as a defendant in the action.

JUDGE JULIAN: I don't think that makes any difference.

Q Would you continue describing your experience with the medical and psychological aspects of unwanted pregnancies with minors under 18? You might describe the variations with age.

A The younger the girl who is pregnant the higher the risk of that pregnancy. This is well established in terms of prematurity, toxemia, and so forth, and in terms of first pregnancy as well. So that from 12 on indeed the risks, the medical risks of continuing the pregnancy do lessen but at 16 again [31] one must recognize that some 16 year olds are physically and mentally only 12. It is an individual matter.

Similarly I think the trauma of the unwed minor carrying through with the pregnancy, absence from school and the emotional isolation of this youngster from all her peers is a very great problem for her as well as her parents.

Q Yes. In your opinion as a class can minors who are at age 17, for example, give an informed consent to an abortion procedure?

JUDGE JULIAN: A little louder. I can't hear you.

Q In your opinion can minors of age 17 as a class give an informed consent to an abortion procedure?

JUDGE JULIAN: What age?

MR. LUCAS: Age 17.

MR. BEHER: Objection.

JUDGE ALDRICH: Go ahead.

A In my opinion there is no doubt at all that at age 17 most of our youngsters these days are thoroughly able to give an informed consent, and perhaps it is worthwhile to say from a medical point of view their knowledge of the situation is just as good and as broad as their knowledge of venereal disease for [32] which they can now obtain medical treatment without parental consent as a minor.

Q What has been your experience with the ability of 16-year-olds to understand the nature and consequences of an abortion procedure?

A I think —

MR. BEHAR: I object for the record.

JUDGE ALDRICH: You may answer.

JUDGE JULIAN: Do you have an opinion, first of all?

THE WITNESS: Yes.

A I think that at 16 a great majority of the girls certainly would be able to give an informed consent. But the age level is not what a doctor regards as the way to judge whether this individual or that individual should have responsibility for their medical treatment.

Q Do you have an opinion as to whether or not a minor who is 15 could give an informed consent?

MR. BEHAR: Objection.

JUDGE ALDRICH: The question is whether a minor could?

MR. LUCAS: Yes, sir.

JUDGE ALDRICH: That is a rather narrow question.

[33] Q Perhaps I should ask: What has been your experience with the ability of 15-year-olds to give an informed consent?

JUDGE ALDRICH: Has he had any experience? He deals with a clinic which requires parental consent.

MR. LUCAS: The consent of one parent is required. The fact that parents do consent would not necessarily indicate that the minor was incompetent to consent for herself. That would be our position.

We would just like to ask questions about the ability of minors at different ages to understand the nature of the procedure and to give an informed consent to try to establish if age is rationally related to the procedure.

JUDGE ALDRICH: We exclude that question.

Q Doctor, are there any medical reasons for categorically denying an abortion to persons under the age of 18?

A No, sir, I don't think so.

Q Does age have any relationship to the medical needs of a patient with an unwanted pregnancy?

A As I stated before, the younger the child the higher the risk with an unwanted pregnancy.

Q Are there any psychological reasons why a person under age 18 should be denied an abortion procedure?

[34] MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

MR. LUCAS: I think the witness testified that a great deal of his experience in the gynecological area —

JUDGE ALDRICH: Excuse me. Counsel, you should first ask the witness whether he has an opinion and then, in this instance, we would like to hear what the basis of it is, if he has any.

Q Do you have an opinion as to whether there are any psychological reasons for withholding an abortion from a person under 18?

A Yes, I suppose so.

Q What is the basis for your opinion in this field?

MR. BEHAR: Objection.

JUDGE ALDRICH: He may give the basis for his opinion.

A My opinion would be that —

JUDGE ALDRICH: No. On what basis do you rely?

Q What basis in your experience, in your clinical experience, for example, do you rely on?

A Well, my opinion would depend on a quite close experience with these young people from the age of 13 to 16 in their reaction to a pregnancy, in [35] their emotional reaction, and I think I have a fair amount of experience in that.

Q And would your opinion be as to whether there would be any psychological reasons for withholding an abortion procedure?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: We will allow this answer but on the limited basis of your own observations. In other words, you

have not been qualified, as I understand it, in general psychiatry. You have observed these children. You can tell us what you have observed about their emotional state before and after.

A My experience would indicate that in the vast majority of cases these young people are tremendously relieved. I have to say that in my experience I can think of one situation where perhaps psychologically with psychiatric help it might have been urged that an abortion was not done. I am not a psychiatrist, your Honor. In any ambivalent situation I would run to get help from an expert. It could be that once in a while there might be a reason psychiatrically for continuing the pregnancy but this is very rare.

Q Have you personally had any specific training in the [36] psychological aspects of adolescent pregnancy?

A No formal training, no.

Q Have you studied the subject as an academic matter?

A Only insofar as I was interested in reading the literature.

Q Have you read the literature on the psychological aspects of unwanted pregnancy among minors?

A I suppose I have read most of the current literature.

Q Do you read the psychiatric literature in that field also?

A Not now. When I was an editor of a psychiatric psychosomatic journal I used to.

Q Do you have an opinion as to whether there are instances in which there are positive reasons why parents should not be involved in the minor's decision to have an abortion?

MR. BEHAR: Objection?

MR. REYNOLDS: Objection.

MR. BEHAR: Our objection goes to the qualifications, first.

JUDGE ALDRICH: Let's hear what basis you have for an opinion. We are not asking for the opinion, but your qualifications to express it.

JUDGE FREEDMAN: First of all, do you have an opinion?

[37] THE WITNESS: Yes.

JUDGE FREEDMAN: What is the basis for your opinion, without giving us the opinion?

THE WITNESS: I would have to rely on my answer to the previous question. It would just be my experience with a lot of these young people dealing with their problems.

Q Let me ask you one further question on your background and experience. Is it routine practice for gynecologists to also deal with the psychological aspects of adolescents?

A Mr. Lucas, I wish there were more gynecologists who did this. It should be part of the discipline. Unfortunately I am afraid a lot of gynecologists have other surgical interests in mind.

Shall I now answer?

JUDGE ALDRICH: No. We haven't asked what your opinion is yet.

Q Do you have an opinion as to whether or not parental involvement in the minor's decision is necessarily helpful in every case?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: I couldn't hear you. Would you please speak up?

[38] Q Do you have an opinion, and this is a slightly different issue, do you have an opinion as to whether or not parental involvement is necessarily helpful in every case of a minor who is pregnant and under 18?

JUDGE FREEDMAN: Helpful to whom?

MR. LUCAS: I suppose I mean helpful to the clinical evaluation of the minor's problem.

A Yes, I do.

JUDGE ALDRICH: And your basis for that is your experience?

THE WITNESS: As before stated it would be my experience with these young people and their parents.

JUDGE FREEDMAN: Could you give us a rough estimate as to the number of cases you have personally observed?

THE WITNESS: In the last 25 years or 30 years —

JUDGE FREEDMAN: Are you talking about the hundreds or the thousands?

THE WITNESS: Oh, no, I suppose in the hundreds. That would include my experience in the clinics, too, hospital clinics.

JUDGE ALDRICH: You have dealt with [39] parents?

THE WITNESS: Indeed, almost inevitably when one of these questions comes up, your Honor, the parents are called in — at the moment, of course, because it is the law.

JUDGE ALDRICH: The question is whether you have an opinion as to whether in an appreciable number of instances parents increase the emotional problems? Is that your question, Mr. Lucas?

MR. LUCAS: Yes, that is the question.

MR. BEHAR: I am going to object.

JUDGE ALDRICH: He may answer.

A Occasionally when these parents that are totally inadequate in dealing with a youngster's problem — I remember a retarded mother and an alcoholic father, in a situation where the youngster in mid-teens was so desperately out of touch with her parents that to bring them into this situation merely would aggravate an already critical problem. I can also remember another case, for instance, where the mother gave her permission but said, "On no account must my husband know of this. He is a cardiac. I refuse to allow my husband to be in on this at all. I know that it would be perhaps fatal."

[40] JUDGE FREEDMAN: What about cases in which the parents do not have a physical or mental handicap or impairment?

THE WITNESS: Yes, and refuse to go along. The only thing I remember doing is calling in a social worker or psychologist or another doctor to help me try to resolve the dilemma.

JUDGE JULIAN: In most instances do they go along with the doctor or not?

THE WITNESS: I think in most instances they do go along with the doctor, your Honor. I think they depend on the doctor's opinion about the medical risks of continuing the pregnancy.

Q In your clincal practice what are some of the reasons that are given for withholding consent?

A One of the reasons would be just what I have stated — the ability to get along with one or both parents, or it might initiate a difficult cardiac situation or some other medical reason. Often enough the young person is possibly wrong. They are convinced that the parental disapproval would be something she cannot face.

Q Is it just as difficult for the patients to notify their parents as it would be for them to obtain their consent in your experience?

[41] MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Excluded.

Q Have you ever had instances where the parents withheld consent to punish the minor?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

MR. BEHAR: I don't think he has testified that in his experience parents have withheld consent.

JUDGE ALDRICH: I can't hear you.

MR. BEHAR: I don't believe he has testified that in his experience parents have withheld consent.

JUDGE ALDRICH: The Court is in disagreement about that. You had better ask him, Mr. Lucas.

Q Have you encountered instances where the parents refused consent?

A I don't recall that right now, no.

Q Have you encountered instances where the minors refused to involve the parents?

A I personally have had no experience with that but this did come up sufficiently for the subcommittee —

MR. BEHAR: Objection.

JUDGE ALDRICH: The first part of his answer is received and the rest of his answer is excluded.

[42] Q I don't think I fully understand your answer. Let me just ask you this question about your experience. To what extent are you experienced with instances either in your practice or under your supervision where parents withhold consent or where minors refuse to get consent?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE JULIAN: You keep lowering your voice.

JUDGE ALDRICH: It is more work to listen to your questions than to rule on them.

Q Let me ask you this. Could you describe what your experience has been with minors who do not want to involve their parents in the decision?

MR. REYNOLDS: I object.

JUDGE ALDRICH: He may answer.

A What has been my experience?

Q Yes.

A I can only think of about one case personally that I remember.

Q Have you gained any knowledge from the medical literature about instances in which minors do not want to involve their parents?

A Oh, yes. I think there is a good deal in the medical [43] literature indicating this.

Q Is that the primary reasons for your opinion?

A Right.

Q Have you gained —

MR. BEHAR: I ask that the last answer be excluded. We don't know what the medical literature means.

JUDGE ALDRICH: I don't know what opinion he has given based on medical literature. I was thinking about that.

Q Have the opinions you have given so far been based in part upon your study as an expert gynecologist of the medical literature?

A Yes, sir.

JUDGE ALDRICH: I guess you will have to try to cross examine on this, counsel.

Q In your clinical evaluation of a minor patient what role do you think should be and in your clinical evaluation of a patient to what extend do you take into account the parents' views on whether or not the minor should have an abortion?

JUDGE ALDRICH: In the medical literature?

MR. LUCAS: No, in his clinical evaluation of the patient.

JUDGE ALDRICH: I understood that the [44] clinic he is involved with requires parental consent.

MR. LUCAS: The consent of one parent, your Honor.

JUDGE ALDRICH: All right.

A Yes. Of course this comes into any consideration of an abortion for a minor child. That is not only what one parent but what both parents feel, because this can be a bone of contention between the wife and husband.

Q Is it one of many factors which enters into your decision?

A Yes, it is.

Q What are some of the other factors that enter into your evaluation of the patient?

A As I mentioned before, I think that a doctor and only a doctor can hope to assess the responsibility, maturity and development of this individual who is a minor by age, who may for three or four years, however, be wholly capable of being responsible for her actions. This is the judgment that I hope very much may be reserved for the medical profession rather than litigated in the courts.

Q Do you have an opinion whether it is medically necessary in your practice to avoid parental veto [45] of the minor's decision in making your clinical evaluation?

MR. BEHAR: Objection.

JUDGE ALDRICH: In light of the fact there could be a veto by one, and he has run into that problem, to the extent he may answer.

I mean an attempted veto by one, which they do not recognize.

A As I understand your question: Does this concern the doctor?

Q The question, I think, was whether or not —

MR. LUCAS: Could you read back the question?

(The following question is read:

"Q Do you have an opinion whether it is medically necessary in your practice to avoid parental veto of a minor's decision in making your clinical evaluation?")

A I think, counsel, the physician in trying to evaluate all factors has to take into account the possibility that parental veto may disturb, if you will, the whole situation. It is one of the factors that has to be taken into account.

Q Does parental veto interfere with the exercise of [46] your medical judgment?

A It is possible.

MR. BEHAR: I ask that that go out.

JUDGE ALDRICH: That may go out.

Q Would you distinguish between the mandatory parental consent and involvement of parents in the decision-making process?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE FREEDMAN: Would you rephrase your question?

Q In your evaluation of the patient would you distinguish between involving the parents in the decision as opposed to giving parents control over the decision?

JUDGE ALDRICH: Evaluating the patient for what?

MR. LUCAS: As to whether to go forward with an abortion for the patient, a patient under 18, of course.

JUDGE ALDRICH: The question is whether he would give weight to the fact one parent would disapprove?

MR. LUCAS: Whether he would distinguish the problem of possible parental veto from the problem of possible parental involvement.

[47] MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: We do not understand that question. I thought I put it clearly — immodestly.

Q Would parental involvement be as much an interference in the physician's role with the minor patient as parental veto?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Can't you put the question just simply whether it makes a difference in his decision as a general proposition if one of the parents says that he is unwilling or she is

unwilling to consent, or do you mean something more than that?

MR. LUCAS: I am trying to distinguish between the problem of notifying and involving the parents on a case-by-case basis as opposed to the parents having an absolute veto in every case.

JUDGE FREEDMAN: I question the worth of this question to your case, counsel, for the simple reason that I thought the doctor had explained that in only one case does he recall one parent vetoing what the other parent had already given, that is, consent.

MR. LUCAS: He also testified as an [48] expert about the broadest scope of the problem. Certainly expert witnesses often testify about things which they do not have any direct clinical experience but have expert knowledge.

I will withdraw that question and I will ask this final question.

Q Can you think personally of any rational reason whatsoever for requiring the consent of both parents in the case of every minor under 18 who is pregnant and seeks an abortion?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: That is much too broad.

Q I believe I asked you earlier about the medical and psychological reasons. I think I will not pursue that question.

MR. LUCAS: I don't think I have any further questions of this witness at this time.

JUDGE ALDRICH: We will take a recess before the next witness and counsel for the defendants can decide whether they wish to make a partial cross examination at this time.

(Recess.)

MR. BEHAR: The defendants reserve their cross examination, your Honor.

[49] JUDGE ALDRICH: Very well.

MR. LUCAS: I would like to call as our second witness Dr. Jane E. Hodgson.

JANE E. HODGSON, Sworn
Direct Examination by Mr. Lucas.

Q Would you state your name and current address, please?

A Jane E. Hodgson, 1537 North Fisk Street, St. Paul, Minnesota.

Q What is your current position, Doctor?

A I am associate professor of obstetrics and gynecology at the University of Minnesota, a full-time teaching appointment at St. Paul's Ramsey's Hospital.

Q Are you licensed to practice medicine in the Commonwealth of Massachusetts?

A I am.

Q Are you licensed in any other places?

A In Minnesota, in the District of Columbia, Kansas and Missouri.

Q Where did you do your residency training in Ob/Gyn?

A Mayo Clinic, Rochester, Minnesota.

Q Do you have your Ob/Gyn boards and in what year did you get those?

[50] A In 1949.

Q How long have you been practicing in Ob/Gyn?

A Since 1947.

Q Have you written articles about obstetrics and gynecology and subjects within those fields?

A I have.

Q Have you attended medical educational conferences in Ob/Gyn?

A Frequently.

MR. LUCAS: May I have the curriculum vitae marked.

THE CLERK: Plaintiffs' 5 for Identification.

(Curriculum Vitae of Dr. Jane E. Hodgson marked Plaintiffs' Exhibit 5 for Identification.)

MR. BEHAR: Your Honor, could we have some sort of agreement that counsel will provide the defendants with copies of exhibits 1 and 5 and also 4?

JUDGE ALDRICH: Yes. The Court would like to have three copies of Exhibit 4. We do not need three copies of Exhibit 1 and Exhibit 5.

MR. LUCAS: I would be glad to do that. I only received the exhibits this morning or we would have had copies.

[51] JUDGE ALDRICH: All right.

Q Would you identify Exhibit 5, please?

A This constitutes a record of my various post-graduate education, my memberships in various medical societies and awards and a bibliography of the articles I have contributed to the field.

MR. LUCAS: We would like to move the admission of Exhibit 5 into evidence as evidence of Dr. Hodgson's background and experience.

JUDGE ALDRICH: Yes.

(Plaintiffs' Exhibit 5 for Identification received in evidence.)

Q Dr. Hodgson, would you describe the extent of your experience in dealing with adolescent gynecological patients?

A As a woman gynecologist since 1947 I think I have seen more than my share of adolescent gynecological patients simply because they seek out a woman or their parents seek out a woman. As medical director at Pre-Term Washington, at the Free-Standing Abortion Clinic I have served there for

almost two years, during which time I supervised over 25,000 first trimester abortions. At the time I left Pre-Term the percentage of patients under the age of 18 that were being treated constituted approximately 11 [52] percent. In Minnesota I have been watching and I have been aware of the increase in this age group that are problem pregnancies, and I have been very much concerned to note that within the last 100 patients that have sought help at the University of Minnesota, 20 percent of these were under the age of 18. For the last 600 patients, however, it would constitute about 13 1/3 percent. This is a rising percentage. It is alarming.

MR. BEHAR: I move that that go out.

JUDGE ALDRICH: Rising percentage.

Q Would you finish describing your experience with adolescent patients or have you completed that description?

A I have completed the description.

Q You also have two teenage daughters, don't you?

A I have one teenage daughter and one who is older, 25.

Q So you are an experienced parent?

A Yes.

Q Have you practiced at all in Massachusetts?

A I have served as a consultant here on several occasions for two of the Free-Standing Clinics in the city here.

Q Did you train any physicians in the medical aspects [53] of abortions at those clinics?

A Yes.

Q Did you train them at all in the psychological aspects of evaluating patients?

A Hopefully.

Q Are the psychological aspects of evaluating patients a part of your practice, your clinical practice?

A It almost has to be.

JUDGE JULIAN: Would you read that question?

(The following question was read:

"Q Are the psychological aspects of evaluating patients a part of your practice, your clinical practice?")

THE WITNESS: I would hope so.

Q Is this delegated to the paraprofessional counsellors also?

A It is delegated to paraprofessional counsellors but the doctor of necessity must play a very important role, a key role actually, in supervising the counselling and taking part in the problem cases.

Q What role, if any, have psychiatrists played in the psychological evaluation at the clinics you have had experience with?

A A very active role.

Q Is this on a day-to-day basis?

[54] A Yes.

Q How many patients or what percentage of patients are evaluated actively by psychiatrists in the Free-Standing Clinics you have had experience with?

A It would be difficult for me to say the percentage but they are in constant touch with the operations of the clinic and are contacted with a number of the problem cases. I could not give you an accurate percentage as to the incidence of consultation but they are kept on a retainer basis.

Q Would you describe for the Court some of the medical difficulties encountered by pregnant minors under the age of 18 in your practice?

A Would you repeat that question?

Q Would you describe for the Court the medical problems, if any, encountered by minors under the age of 18 in your clinical practice who are pregnant?

A The medical problems always are increased in this age group. This has been pointed out repeatedly in the literature

and in my own experience. There is the risk of toxemia and premature labor, hemorrhage, Cesarean section, neo-natal mortality, even maternity mortality is much higher in this age group.

Q Do minor patients under the age of 18 who are [55] pregnant encounter any particular psychological problems in your experience?

A No more than any other group.

Q Are you experienced with the effect on the family of a teenage pregnancy in your clinical practice?

A Teenage pregnancy is very disruptive in the family.

MR. BEHAR: Objection. The answer is unresponsive.

JUDGE ALDRICH: I think that is close enough.

Q Would you describe the manner in which it is disruptive?

A An unwanted pregnancy in a teenager is extremely complicated. The social and psychological problems are many. The youngster usually has to give up an education or there is a question of financial support. There is a question of illegitimacy. There is the question of the increased medical risks. All of these things enter into a teenage pregnancy.

MR. BEHAR: I am going to ask that the answer be stricken as there has been no foundation laid for it.

JUDGE ALDRICH: Denied.

Q To what extent have you dealt with patients who were [56] minors under the age of 18 who have had any difficulty or unwillingness in getting parental consent for an abortion?

A Would you repeat that?

Q What has been the extent of your experience with minors under 18 who had difficulty getting parental consent?

A Actually we do not see that type of patient. They don't get to the qualified clinics. If they are unable to get parental consent, and they usually are determined to have the termination, they will seek help elsewhere and they will go to some of

the unqualified centers or criminal abortionists. So that our actual contact is very small with that group of patients.

MR. REYNOLDS: I object.

JUDGE ALDRICH: Is your objection: Does the lady know whether they go to other places? Or what is your objection?

MR. REYNOLDS: Her answer went further than the question. My understanding of the question was she was talking about her experience.

JUDGE ALDRICH: Well, unless there is something wrong with the next question it is a great waste of time to make the question be asked twice. [57] If she is not qualified to give it, that is a very sound objection.

MR. BEHAR: There is no foundation for the rest of the answer, no personal knowledge.

JUDGE ALDRICH: I will sustain it on that basis but not on the ground it is not responsive.

Q Do you have any basis for knowing what patients do who do not get parental consent and do not want to involve the parents?

A Yes. I have been asked this question from a number of clinics throughout the country. Just last week, for example, in Missouri I was in Columbia as a consultant for the Planned Parenthood Clinic there, and I asked them what they do about the parental consent requirement under the Missouri law where the patients were unable to obtain consent, and they said that they just simply —

MR. BEHAR: Objection. This would be hearsay.

JUDGE ALDRICH: It seems to me to be part of the lady's qualifications.

MR. BEHAR: I believe she said that the clinics were in Missouri, and she is experienced with people in Minnesota and her clinical experience, which would present a problem.

[58] JUDGE FREEDMAN: She testified that in various sections of the country she has attempted to get conclusions and based upon her experience and what she has obtained elsewhere this is what she is now elaborating on.

MR. BEHAR: There is no tie-in between the patients that she is talking about and her clinical experience.

JUDGE ALDRICH: You may answer.

MR. LUCAS: Would you read the question?

(The following question was read:

"Q Do you have any basis for knowing what patients do who do not get parental consent and do not want to involve the parents?")

JUDGE ALDRICH: She did answer that question. Had you finished your answer, Doctor?

THE WITNESS: No, I had not. I was just about to say what happened to these patients. They went elsewhere simply because they were referred elsewhere by the various clinics who refused to accept them without parental consent. They are told where they can go and have the procedure done without parental consent. In other words, the law is being broken all over the country where there is [59] such a law.

Q Was this part of the ordinary clinical practice you observed while you were in Columbia?

A Yes, and the same thing exists right in St. Paul, Minnesota.

Q Are you familiar also with the ability or inability of minors to understand the nature of an abortion procedure and to give an intelligent consent to such a procedure?

A I don't think chronological age enters into the problem except the very immature or the sub-normal, mentally subnormal individual.

MR. REYNOLDS: I move that that go out, if your Honor please, as not responsive.

JUDGE ALDRICH: That is based on your personal observations, Doctor?

THE WITNESS: That is right, sir.

JUDGE ALDRICH: All right.

Q Do you have an opinion as to whether or not a 17-year old is capable of giving an informed consent to abortion as well as an 13-year-old — I mean 17-year-olds as a class?

MR. BEHAR: Objection.

JUDGE ALDRICH: The question is whether she has an opinion. Do you? Not what it is, but [60] do you have an opinion?

THE WITNESS: Yes, your Honor.

JUDGE ALDRICH: And the basis for that is what you have told us or is there something else?

THE WITNESS: On the basis of my personal experience.

Q Do you include in that basis the experience you have supervised also?

A Yes.

Q What is your opinion as to the ability —

JUDGE ALDRICH: Does this question relate to all or some or many or what?

MR. LUCAS: To 17-year-olds as a class.

JUDGE ALDRICH: Well, there can't be a total class, can there?

MR. LUCAS: No, but the statute does as a class require all persons under 17 to obtain parental consent of both parents. Then I would ask for some details about the specific experiences.

MR. BEHAR: We object to the question and answer.

JUDGE ALDRICH: Mr. Lucas, let's have a more specific basis. How many 17-year-olds has she had this problem with?

Q Approximately how many 17-year-olds have been patients [61] at the clinics where you have had your experience? Can you give us a ough estimate of that?

A It would be at least 2500 under the age of 18 but I could hardly break those down. I'm afraid I couldn't tell you the number of 17-year-olds in that group.

Q But you know how many are under 18?

A Yes.

Q Do you not have any breakdown on it year by year?

A There is a breakdown but I cannot quote it to you.

Q Do you regard the year-by-year factor as being even relevant in the minor's case?

A No, I do not.

JUDGE JULIAN: Doctor, do I understand you to say that there is no significant difference between a 13-year-old pregnant girl and a 17-year-old adolescent in this matter?

THE WITNESS: I think the maturity of the individual depends —

JUDGE JULIAN: I mean generally.

THE WITNESS: Would you mind repeating that, your Honor?

JUDGE JULIAN: You said that there is no significant difference among pregnant girls under the age of 18, which I assume meant that whether they were 12, 13 or 14 or 17 or 18 it made no [62] substantial difference with respect to this.

JUDGE ALDRICH: With respect to their ability to consent. I think that was the question.

THE WITNESS: I think that many other factors enter into their ability to deliver an informed consent, their social condition, their strata in society, their education, their emotional maturity. All these factors are so different that some 12-year-olds will be more mature than 18-year-olds.

JUDGE JULIAN: I understand that. We are not dealing with exceptions. That is why I asked you as a group.

THE WITNESS: As a class undoubtedly the immaturity would be more remarkable in the 12- or 13-year-olds, yes.

JUDGE JULIAN: What do you mean by more remarkable?

THE WITNESS: They would be more in need of parental support.

Q What percentage of 17-year-olds would you say are capable of giving an informed consent in your experience?

A The vast majority.

Q Is there any particular age at which a minor becomes [63] incapable of giving an informed consent in your experience?

A No.

Q Have you ever encountered a 13-year-old capable of giving an informed consent?

A I have.

Q Have you ever encountered a 19-year-old incapable of giving an informed consent?

A I have.

Q Do you consider age just one of many factors in that decision?

A Right.

Q Doctor, have you been a candid advocate of elective abortion in your experience in the last several years?

A I have.

Q Were you the principal party in a court case, which I have given the Court earlier, that overturned the Minnesota law that was passed this year?

A Right.

Q Were you also the principal party in a challenge to the old Minnesota law back in 1970?

A Right.

Q Was this a case where you performed an abortion on a particular patient in violation of the law?

[64] A I did.

Q Did this result in the law being overturned?

A Yes.

JUDGE JULIAN: How high up did that go? Would you give me the citation?

MR. LUCAS: 204 Northwest 2d 199. I do have extra copies of this.

JUDGE JULIAN: What is the title of the case?

MR. LUCAS: State v. Hodgson.

Q Did either of those cases have anything to do with parental consent?

A No.

Q Is there a law on the books anywhere where you practice now which requires parental consent?

A Not to my knowledge. May I add that it is required, however, at the institution where I work and it is enforced.

Q Does this interfere with your practice there?

A It concerns me, yes, it does.

JUDGE JULIAN: It concerns you or it interferes with you?

THE WITNESS: Yes, it interferes.

Q Have you reviewed the parental consent requirement in the recent Massachusetts law?

[65] A I have.

Q Would it be your understanding of that as a clinical practitioner that it requires the consent of both parents?

A Yes.

Q Would you understand that to allow any exceptions, other than an emergency?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Excluded.

Q Dr. Hodgson, do you have an opinion as to whether there are any medical reasons for categorically denying abortions for all minors under age 18?

MR. BEHAR: Objection. There has been no evidence abortions are being categorically denied to minors?

JUDGE ALDRICH: She may answer.

Q Do you have an opinion? Just yes or no.

A Any medical reason?

Q As to whether there are any medical reasons for categorically denying abortions for all minors under age 18 who cannot get parental consent?

A I know of none.

Q Do you have an opinion as to whether there are any psychological reasons for denying abortions to [66] minors under 18 who cannot get parental consent?

A I know of none.

MR. BEHAR: Objection. She was asked whether she had an opinion. She did not answer yes or no.

JUDGE ALDRICH: We ruled on your objection to the substance and it is overruled.

Q In your experience have there been any cases where there were affirmative reasons in your opinion for not informing the parents of the pregnancy? I am just asking about your experience now without a specific opinion. Have you encountered cases where there were positive reasons why the parents should not be told in your opinion?

A This happens rather frequently, yes.

Q Could you describe some of these cases?

A Illness on the part of the parents where the concern would be so deep, as Dr. Sturgis cited, cases where patients are concerned over their father's coronary status or their mother's emotional illness, alcoholism, marital instability, instability in the home, marital discord. All these things are factors in keeping them from communicating with their parents.

Q Have you also encountered situations where parental [67] involvement would be helpful?

A Yes, indeed. I encourage it in every instance. I think it is extremely important and to be sought after but there is the rare case where it is impossible to obtain.

Q Is it even more difficult when you have to obtain the consent of both parents?

A It simply is an added impediment to the treatment of the patient.

Q Could you make any kind of statement as to what particular kinds of family situations there are when parental consent is difficult to obtain?

MR. BEHAR: I object. I believe she testified that she does not treat patients unless she has parental consent. I am not clear what we are really talking about, what the answer is predicated on.

JUDGE ALDRICH: With that explanation, Doctor, can you answer the question?

THE WITNESS: Sometimes we see the patients and have to refuse them because they fail to obtain parental consent. We know what they are going to do. So I do have personal contact with that group of patients.

Q What are some of the reasons the parents give for [68] withholding consent and the instances of your experience and where you have supervised?

A Usually it is of a religious nature or they are urging the child into an early marriage. It is usually a matter of morality. They want to conform to society's standards. Illegitimacy is something they dread. Many of these youngsters are forced into early marriages.

Q Do you encounter instances where the parents try to force the minor to have an abortion?

A Yes. I have encountered that a number of times where I felt it was for the welfare of the patient that they continue the pregnancy, if it is their wish to do so, and if there are logical reasons for continuing the pregnancy. As a rule the ten-

dency in these days is for parents to wish to influence the child to terminate the pregnancy rather than the other way arour.

May I cite an example? Just last week I had a patient, an Indian girl, age 14, who came from a reservation up in northern Minnesota where her education had been completed, and she was ready to get married, and her boy friend was very supportive, and they wanted to continue the pregnancy but they had been almost coerced into coming down to St. Paul [69] to be aborted, and we refused this patient, and she is continuing her pregnancy.

We encounter this type of thing fairly frequently where a mother refuses to believe that her daughter is mature enough for responsible motherhood and marriage.

Q Are there any national medical standards about the desirability of requiring parental consent, any medical opinions as opposed to legal opinions?

A It is impossible, I think, to develop any standards because each case is an individual problem and has to be evaluated on its own merits. That is why legislation is so difficult.

Q Have you written any articles on the subject of abortion?

A Several.

Q Have you recently published a study of complications in first trimester abortions?

A I have.

MR. LUCAS: May this be marked as an exhibit?

(Study of Complications in First Trimester Abortions marked Plaintiffs' Exhibit 6 for Identification.)

Q Is this a copy of an article you recently published?

[70] A It is.

MR. LUCAS: We would like to offer this into evidence.

JUDGE ALDRICH: Have you given copies to your brothers?

MR. LUCAS: Yes, I have. We would like to offer this as evidence of Dr. Hodgson's experience, clinical experience.

JUDGE ALDRICH: We are waiting for you to show copies to your brothers.

MR. LUCAS: I have given them copies.

JUDGE ALDRICH: I am sorry.

MR. LUCAS: Would you mark this as an exhibit?

(Communication to Minnesota Medicine on the subject of Teenage Mothers marked Plaintiffs' Exhibit 7 for Identification.)

Q Is Exhibit 7 a communication to Minnesota Medicine that you wrote on the subject of Teenage Mothers?

A Right.

MR. LUCAS: We would like to introduce this also into evidence as part of Dr. Hodgson's experience and qualifications.

MR. BEHAR: As far as the study goes there seems to be no breakdown relative to minors [71] on this. It seems to be a rather undifferentiated study. Primarily on that basis we would object to it.

The witness is here in court I assume on the question of the challenged statute. I fail to see how this relates to that.

As to the letter, I think it is totally self-serving. She is here and can testify.

MR. LUCAS: We have introduced them for the limited purpose of showing her experience.

JUDGE ALDRICH: Six and seven are out.

Q In your clinical experience does the fact that a minor patient is going to pay for an abortion enter into your decision whether or not to abort her? Does the profit motive enter into your decision in your practice?

A I hope not.

JUDGE JULIAN: Her own individual practice?

MR. LUCAS: Yes.

Q Do you feel there is any conflict of interest between you and the patient when you are evaluating her from a financial standpoint?

A If there were it would behoove me to encourage them to continue their pregnancy because an obstetrical fee [72] is certainly or is usually higher than a pregnancy termination fee.

JUDGE JULIAN: That would be provided the patient intended to have the same doctor as her obstetrical expert and not for the purpose of aborting her.

THE WITNESS: I perform obstetrics as well.

Q Would you regard it as unethical to encourage the patient to go through with the pregnancy for the purpose of getting a larger fee?

A Obviously.

Q Does the concept of abortion on demand mean anything to you medically?

A I have considered it a very inflammatory term which has been used by the opposition of abortion law reform to arouse the medical profession, I think, more than anyone.

Q Is the availability of elective abortion accepted by the national medical organizations in Ob/Gyn?

A Yes.

MR. LUCAS: I think I have no further questions.

JUDGE ALDRICH: Thank you, Doctor.

MR. BEHAR: We would reserve cross [73] examination of this witness, your Honor.

MR. LUCAS: Dr. Carol Nadelson. We would like to call her as our last expert witness.

CAROL NADELSON, Sworn

Direct Examination by Mr. Lucas

Q Would you state your name and address.

A Carol Nadelson, 30 Armory Street, Brookline, Mass.

Q What is your current position, Doctor?

A I am assistant professor of psychiatry at Harvard Medical School and associate psychiatrist at Beth Israel Hospital in Boston, and director of medical student education for the psychiatry department at Beth Israel Hospital.

Q Would you tell the Court what your educational background in this field has been?

A I received my M.D. degree from the University of Rochester in 1961. I subsequently interned in medicine at the University of Rochester Hospital. I subsequently came to Boston and had two years of psychiatric residency training at Massachusetts Mental Health Center and two additional years at Beth Israel Hospital and I have been on the staff since that time.

[74] Q What has been your experience with evaluating adolescent patients, female adolescent patients?

A The greater percentage of both my teaching and clinical practice has been devoted to adolescents not involved in any way with pregnancy. A significant percentage — for a period of several years when I was liaison psychiatrist for the obstetrics and gynecology department — was devoted to evaluating pregnant teenagers.

Q Are you licensed to practice in the Commonwealth of Massachusetts?

A Yes.

Q What has been the extent of your experience with evaluating teenagers who are abortion candidates?

A Well, up until last year I either saw personally or supervised and consulted on every teenager who was aborted or

who asked to be who came to the Beth Israel Hospital. Prior to that, I guess it was 1971, I was involved mostly with the direct evaluation. I was not responsible for the program. At that point I directed the program and was responsible for evaluation and decision-making.

Q Would you describe in your experience what the impact of an unwanted pregnancy is upon a person under age 18?

[75] A Most of the youngsters we see at the time we see them — and I might add we usually see them on referral from some other agency or on self-referral, and we see them after they have already had the diagnosis of pregnancy made, and they tend to be generally quite upset, often non-communicative and withdrawn, sometimes very sad, anxious. The response varies with the youngster. It has a lot to do with what her previous adjustment was like and what her home situation has been like.

Q Does a requirement of parental consent ever delay the stage at which they have an abortion?

A Yes.

Q Is this hazardous in any way to the patients?

JUDGE ALDRICH: Louder, please.

Q Is this hazardous to the patient in any way, this delay?

MR. REYNOLDS: Objection.

MR. BEHAR: Objection.

A Yes.

JUDGE ALDRICH: There were two questions I never heard. What was the first one?

MR. LUCAS: The first question was whether the requirement of parental consent ever delays the patient in being scheduled for abortion.

[76] THE WITNESS: Yes.

JUDGE ALDRICH: What was your next question?

Q Whether this poses any hazard for the patient?

A Yes.

JUDGE ALDRICH: From a medical point of view?

MR. LUCAS: First medical and then psychological.

MR. BEHAR: I object on the medical.

JUDGE ALDRICH: She may answer.

A From a psychological point of view it does also.

Q In what way does it pose — does delay pose a psychological hazard to the patient?

A Well, when you have a person who is already in a crisis situation and is extremely anxious their anxiety increases and often they develop symptoms like sleeplessness, weight loss, loss of appetite, they don't want to go to school. There is a whole variety of other kinds of anxiety-related problems. Sometimes teenagers who do not have the same delay capacity that adults have will do something impulsive while waiting because they cannot tolerate their anxiety.

Q To what extent have you had direct contact with [77] teenagers who could not get parental consent?

A I have had some contact with those teenagers. In the past we would see every teenager regardless who came in, and if a teenager refused or felt she could not get parental consent we would try to explore why and try to make some assessment as to what we could do and also to encourage her to get parental consent or involve her parents. All our evaluations whenever possible do involve parents.

Q What do these patients give as reasons for not wanting to involve the parents?

A As the doctor who just testified stated, and I have had similar experiences, it is often parental illness, alcoholism, and I am talking about both physical and emotional illness. I might add something that I think is terribly important and that is that a good many of the teenagers we see in our clinic either do not have both parents available, never have, or do not know the whereabouts of one of their parents, and some of their family situations are extremely unstable.

Q What are some of the types of family situations that lead to this conflict between parents and child, the minor?

A It is variable. It depends on the group. But often a child will feel that they cannot talk to their [78] parents, one or the other of the parents do not understand, and the fear of upsetting them. They sometimes have no contact with the parents.

It is not at all infrequent that a teenager will never have seen one of her parents or have no idea where they are and they feel very disconnected from them.

The parents, on the other hand, often feel guilty and angry. They may feel punitive towards the child if they feel they have been injured by her action. And sometimes they feel they are doing the best thing and the teenager thinks something else is the better thing. So it is just a difference of opinion.

Q Do you have any experience or contact with patients after they have had abortions?

A Yes.

Q Would you describe the psychological reactions of minors under the age of 18 after having had an abortion?

A Most of the teenagers I have seen who have had an abortion feel relieved by it. They feel that they have done the right thing and have a second chance often. There are a very small percentage who feel guilty and a very small percentage that are sorry [79] about it, — really less than 1 percent in my experience. Most teenagers feel that they are better off afterwards than they were before or in fact many of them feel, and it is certainly evident clinically, that they have grown from the experience, especially if it is handled properly.

Q Do you have any experience with the effect of continuing the pregnancy on these minors?

A Yes. We have a teenage clinic at the Beth Israel where youngsters who want to continue their pregnancy are seen, and the problem that tends to arise is that the time of delivery

most of the youngsters we see want to keep their babies. They do not want to give them up for adoption.

It is becoming more and more usual for youngsters to want to do that, and they get into sometimes serious difficulty in terms of their maturity and in taking care of their baby. If they come from a stable family they can get some help sometimes but most of the teenagers we see do not come from stable families, and it is difficult for them to get help, and it is very difficult for someone who is still a child to have a child and bring up a child.

JUDGE FREEDMAN: Do you often get repeat [80] patients?

THE WITNESS: Yes.

JUDGE FREEDMAN: They have been aborted and have come back again?

THE WITNESS: Yes. I cannot quote the exact figures but it does not seem to make much difference about whether they have had an abortion or a pregnancy carried to term. The repeat rate is high in either case.

Q Do you have an opinion, yes or no, as to the ability of a person under 18, a minor pregnant, a minor under the age of 18, to give an informed consent for an abortion procedure?

A Yes.

Q Is this opinion based on your experience that you have previously described?

A Yes.

Q What is your opinion?

A I believe they can and do. I do feel that what is required is a very careful explanation and time in order to understand fully the implications of their decision.

Q Could you give an estimate of approximately how many, what percentage of 17-year-olds could give such an informed consent?

[81] A That is very difficult. Most of the 17-year-olds certainly are quite clear. I think the difficult time is in the 11, 12 and 13-year-olds that we see. It is much more time consuming and difficult for them to understand what it means. A teenager generally does not connect pregnancy — the events leading to pregnancy with pregnancy and with having a baby. Those three are not connected the way they are in most adults' minds.

Q With the class of patients under 13 is parental involvement a magic solution to the ability of them to understand?

A It is helpful, it is extremely helpful, and we try very hard to get everybody, the entire family, involved if we can, as many people as can sit down together and talk about it. It is not always possible.

Q Do you encounter instances of parents opposing abortions of 13-year-olds?

A Yes.

Q On what grounds?

A Well, the usual reasons tend to be religious or moral reasons, but parents sometimes will label a youngster as a bad kid and feel she needs to be punished, and that is the way to punish her, and that she will improve if she is punished.

* * * * *

DECEMBER 30, 1974.

[2] THE CLERK: William Baird and others v. Robert Quinn and others.

MR. BEHAR: Dr. Sturgis.

SOMERS H. STURGIS (Resumed)
CROSS-EXAMINATION BY MR. BEHAR.

Q Doctor, would you restate your name for the record?

A My name is Somers H. Sturgis. I live at 47 Raymond Street, Cambridge, Massachusetts.

Q Doctor, you indicated on direct examination that pregnancy, an unwanted pregnancy may be an emotional tragedy to a minor; is that correct?

A Yes, indeed.

Q And isn't it also the case that an abortion may prove to be an emotional tragedy for a minor in your experience?

A Of course this is so and one has to judge which —

MR. BEHAR: I move that that be stricken. He has answered the question.

JUDGE ALDRICH: The answer is yes. On the other hand, I see no reason why the witness should not be allowed to explain. It is not responsive to your question, but we might as well have it now as some other time.

MR. BEHAR: Please note by objection.

JUDGE ALDRICH: All right. Your objection is sustained. We will put the witness back on later.

[3] Q Doctor —

JUDGE ALDRICH: I don't think, I may say, that you advance the proceedings very much by this procedure.

MR. BEHAR: Very well. I will withdraw the objection.

Q Would you explain, Doctor?

A The physician must decide whether the trauma, both mental and physical, of carrying the baby to term and the labor thereof is worse or less than an abortion.

Q Isn't it the case, Doctor, that even when that decision is reached and an abortion is, in fact, performed, that operation may constitute an emotional tragedy in that minor's life?

A It is possible in some cases. This is why one counsels these children.

Q In fact, the literature is replete with cases where that has, in fact, happened; isn't that the case?

A I am not familiar with many authors of this sort, no.

Q Doctor, on direct examination your attorney and you referred to the word abortion. Do you make any distinction between first, second and third trimester abortion?

A Of course.

Q When you used the term abortion, for example, in giving your opinion that a majority of 16 year olds can consent, [4] give an informed consent to an abortion, when you used that term, which trimester were you referring to?

A In general, you refer to the first trimester as an abortion. A third trimester is a premature labor, premature miscarriage.

Q What about the second trimester?

A This may be either way.

Q When you gave your opinion, for example, that 16 year olds, a majority of 16 year olds can give an informed consent to an abortion, were you, in using the term abortion, referring to second trimester abortions?

A Occasionally, yes.

Q Isn't it a fact, Doctor, that the medical procedure is more complicated the further on in pregnancy a minor or any woman is?

A The procedure for the second trimester cases is a very simple one actually. In some ways, it is technically much simpler than a first trimester.

Q What is the standard technique for a second trimester?

A Generally, admitting a needle into the amniotic sac of the pregnancy and introducing some material, such as saline solution, that will institute a labor situation, so that the fetus is carried through as in labor.

Q But when you use the term abortion, you are not referring then to third trimester abortion?

[5] A No.

MR. BEHAR: I would ask that the witness be shown a copy of Exhibit 4.

Q You stated, I believe, that that exhibit reflects your own personal views?

A Yes.

Q Isn't it a fact, Doctor, that your personal views as reflected in that exhibit demonstrate that there are minors who are too immature to give an informed consent to an abortion?

A Would you rephrase that question?

Q Your personal views as reflected in that exhibit, aren't they such that they recognize that there are minors who are too immature to give an informed consent to an abortion?

A I would have no hesitation in not agreeing with you in that, sir, because we have always stated that the spectrum of maturity is not limited to age but to the individual.

Q And the problem exists relative to minors in the age group 12 through 17?

A Yes.

Q You have indicated that the physician is put in a problem situation where the minor will not have parental involvement, and you suggest that where parental cooperation is impossible to secure that there is a problem. Does that mean that there should be some effort made to secure parental [6] cooperation?

A Indeed, I fully feel that that is correct.

Q What should this effort consist of?

A Trying to get hold of the parents, if available, and having her and the child come together to talk to the physician.

Q Do you think it good medical practice when absolutely no effort is made to encourage parental cooperation and involvement?

A Sometimes it is impossible.

Q As a general proposition though, it is your view that an effort should be made in that direction?

A Personally, I would myself make every effort to get the parents involved, if it is possible. Sometimes the parents are not available, either one.

Q If the parents are, in fact, available, the effort should be made; is that what you are saying?

A Personally, I would feel so.

Q Exhibit 4, which reflects your personal views, indicates that in a situation where a minor refuses to involve her parents and is not found to be mature by the physician, that a doctor should not act on his own responsibility; is that your view?

A Correct.

Q Who should he draw into the process in your view in the [7] situation?

A I think anyone trained in this area. It may be another doctor. It may be a social worker or a psychologist or a psychiatrist. It may be a minister or someone who is aware of the problem and willing to work on a solution.

Q Isn't it a fact, Doctor, and isn't it accepted medical/legal practice to oftentimes draw in the courts in these situations?

A I don't happen to remember that that is the case, but I think it is mentioned in the literature.

Q Well, we are all familiar with the common situation, say of a Jehovah Witness, for example, who is opposed to having an operation performed on a minor. Isn't that a situation where typically resort is had to the courts?

A There is one big difference and that is the time factor. Since a child who is 10 or 11 weeks pregnant has only a very limited time to become a ward of the court, for example, and as to a Jehovah Witness in general the time factor is not too pressing as it is in the case of a pregnancy.

Q Doctor, isn't it a case where a situation often arises in an emergency where a transfusion, for example, must be administered with speed? We are all familiar with these situations.

A Indeed, in most hospitals there is a chain of command to make it very easy to do because this happens frequently, but in situations we are talking about, that is, where one [8] parent is missing and the other is in the House of Correction or something, we do not get this kind of situation often enough to work out some quick and easy and passive method of getting a court decision. At least I don't know of any.

Q The courts have traditionally been a source of resolving these kinds of parents-child conflicts, have they not?

A Well, there is no tradition involved because it is all so new. This problem —

Q Don't the courts even come into play in the situation where the interest of the parents and child and co-extensive, for example, in the donor situation or in donation where you have a situation where there may be twins, and the parents and one twin agree that a kidney, for example, should be donated to another twin, don't the courts typically sanction those kinds of procedures in your experience?

A I may be wrong, but I believe only one parent's consent is necessary in those cases. It seems strange that in an abortion two parents' consent should be necessary.

MR. BEHAR: I move that the last part go out.

JUDGE ALDRICH: Yes, that may go out.

Q You have indicated that it is generally desirable to have parents involved in the situation of a minor faced with an abortion.

A I would say a parent involved, yes, sir.

Q What benefit does parental involvement bring both to the [9] minor and the family in your experience?

A Well, if a parent can be present and involved in the situation, then the support of that parent is beneficial to the child.

Q What about the family? Have you known the family to grow from such involvement?

A I would think that is entirely up to the parent. There may be other siblings. It would be up to the parents to know whether it would be helpful for them to be involved or not.

Q Would you, in your best medical judgment, accept any reason a minor might advance for not telling her parents that she is pregnant?

A I should think I can think of reasons, yes.

Q Are there any reasons a minor might advance for not telling her parents that you would find unacceptable?

A I can imagine there would be some of those, too.

Q Could you reflect and state to the Court what those might be?

A On the one hand, as I mentioned, one can have a situation where the mother herself — the child herself is pregnant — is illegitimate and her mother is totally uncooperative with this child's actions. I can think of a Roxbury family where the father was away, and he had not been back, and there was no parent other than the mother who was totally unsympathetic to the child. It would have [10] been very difficult for the child.

JUDGE ALDRICH: I don't think you have made it at all clear to the witness what your question is, counsel.

Q My question is, are there any reasons a minor might give for not informing her parents she is pregnant that you would not find acceptable or would you accept any reason?

JUDGE JULIAN: I find the use of double negatives in your question confusing to me. Avoid the use of double negatives.

JUDGE ALDRICH: We go further than that. This is purely speculative matter. You can argue that to the Court.

MR. BEHAR: Do I understand you are excluding the question?

JUDGE ALDRICH: That particular question, yes.

Q Suppose a minor has no reason for not telling her parents she is pregnant, would you accept that as a valid excuse for not informing the parents?

A If she has no reason for —

Q She just says, "I don't want to inform my parents and I am not going to tell you why." Is that acceptable to you?

A I feel this is exactly where the counseling aspects of this question should come up and I would want to take time to talk to this child a good bit more to see if I can find out [11] what the reasons were.

Q If there is a refusal by the minor to inform her parents, in your experience and training is that symptomatic of perhaps an emotional upset relating to the pregnancy?

A Oh, indeed it may not be so. It may be quite easy to understand why she might not want to. It still leaves the physician in a great deal of a problem.

Q What I am saying or what I am asking you, Doctor, is whether the fact that a minor does not want to inform her parents of her pregnancy, is that fact symptomatic of emotional problems with that child?

A It may certainly not be so.

Q May it also be so?

A In some circumstances, possibly, but all of us know that some children are emotionally unstable and others are very stable. That is up to the physician to try to decide.

Q You indicated for the minor who refuses to inform her parents of her pregnancy that it is important for the physician to consider the medical predicament and the medical reasons

for interruption of this minor. Does that mean that a pregnancy of a minor should only be interrupted for medical reasons?

A If you will include in the medical reasons what I have said. The trauma of the abortion in the physician's opinion being far less than the trauma of carrying through the [12] pregnancy, this is a medical judgment, I presume, and partly founded on the knowledge that the younger the mother, the younger the child who is pregnant, the greater are the medical risks involved in carrying through the pregnancy.

Q Have you encountered any situations where there would be no medical reasons for interrupting the pregnancy of a minor?

A I can't think of any.

Q So it is merely the inherent risk of the pregnancy that justifies the procedure; is that what you are saying?

A Yes.

Q You indicated that in your view it is the doctor who is the person most qualified to judge the degree of maturity and responsibility of a minor who refuses to inform her parents; is that correct?

A Yes.

Q Isn't it a fact, Doctor, that in the patient-doctor relationship that is often sporadic in nature?

A It may be.

Q In fact, you may have a situation where the minor who is refusing to inform her parents may have only contacted that doctor on one occasion, that particular time; isn't that right?

A That may be so.

Q And are you telling this Court that a doctor who has sporadic contact at best with a patient is in a better position [13] than parents to gauge the maturity and responsiblity of that minor?

A I can only speak of my own experience and say that I believe that as a physician dealing in these matters for some time, I can perhaps apply a fair degree of expertise in trying to gauge the medical risks involved in either an abortion or carrying through the pregnancy. That sporadic interview may be an hour.

Q Is an hour in your view the kind of time that should be spent individually with a patient?

A It is generally adequate in this particular situation to summarize what is the problem involved.

Q And this is a one on one contact with the minor?

A It may be myself or one of my well-trained social workers.

Q Isn't this a situation, Doctor, where the minor wants something from the doctor? She wants to have an operation performed upon her; right?

A Yes.

Q And isn't it likely in that kind of situation that she is going to tell the physician what he or she wants to hear?

A I suppose.

Q And isn't it a fact, Doctor, that given that kind of a situation it is very difficult to gauge the maturity and responsibility of a minor?

[14] A As you recall, in my exhibit here, this is the situation where the doctor is wise to call in another, whether a social worker or another doctor, to support his view.

Q So the doctor clearly should not be making this kind of judgment alone?

A I am only speaking from my own experience and saying this is what I would do.

Q I understand that. Can you state to the Court why informed consent is necessary at all to this procedure?

A By informed consent one implies telling the patient what is going to happen to make it easier for her to accept a

certain amount of discomfort, to allow the client-patient to cooperate in the procedures the doctor is going to do, whether it is an appendectomy, a tonsillectomy or an abortion. It is terribly important in all medical problems.

Q In your experience, aren't there different levels at which a person can appreciate — well, let's take an abortion procedure.

A Of course.

Q There is the emotional level?

A Yes, indeed.

Q Isn't it a fact, Doctor, that it is difficult in an hour interview to gauge at which level a particular patient is appreciating the consequences of the medical procedure?

A This is exactly where the background of the doctor [15] will be helpful because a minor child finds it very difficult to appreciate the emotional trauma of a two year old infant of hers, let's say — the knowledge the doctor has of what the trauma of the sixth to ninth month of pregnancy may entail in this child, or the delivery risk — these things the doctor knows about and it is very difficult to expect the child to appreciate this, even though the doctor may try to impress the child that this is what is going to happen. It is his knowledge and background that one must rely on in making the decision.

Q Is it your testimony that a minor has difficulty appreciating the long-term consequences of a pregnancy, but somehow has a better appreciation of the consequences of an abortion?

A Oh, yes, I think that is true. An abortion, you see, is a direct and immediate situation. This is something that can be appreciated by the child. It is something that is going to happen. The child can figure what will happen tommorow or today or the next day, but to help the child appreciate ahead is a thing the physician must keep in mind in making a decision.

Q Isn't it a fact that minors particularly, and it is part of growing up, that minors particularly have trouble taking a long view?

A Of course.

Q And isn't it really on the emotional level the long-term [16] view that we are really concerned with?

A I agree that that is what I think the doctor knows about.

Q The fact that there might be an immediate feeling of relief or understanding does not necessarily mean an appreciation of long-term effects, does it?

A Well, no.

Q When you gave your opinion on direct testimony relative to 16 and 17 year olds, that a majority can give informed consent, I take it that means that a minority can not?

A Yes, of course.

Q Do you know what an abortion center is, Doctor?

A What an abortion center is?

Q Yes.

A I don't know what you mean by that question.

MR. LUCAS: I object to the relevancy of that. That is probably more tied up in another lawsuit which should not be tried in this court today.

MR. BEHAR: I believe it is relevant to the class action allegations here. I believe it is relevant to the class action motion that these plaintiffs have filed. They purport to represent abortion centers. I am asking this doctor if he knows what it means.

MR. LUCAS: There has been no motion filed to vacate that class action order.

MR. BEHAR: There certainly has been.

[17] JUDGE ALDRICH: I understood there was an attack made on a prospective finding this was an appropriate class.

MR. LUCAS: I understood the Court had ruled.

JUDGE ALDRICH: I didn't think we had.

MR. LUCAS: I don't see where this particular question has any relevance.

JUDGE ALDRICH: Maybe it doesn't. We will take it.

Q Do you know what an abortion center is?

A I don't know what you mean. Would you explain to me what you mean?

Q I am not sure I know what the term means, Doctor. You indicated that you were associated with an abortion clinic in this area.

A That is correct.

Q Would you identify it, please?

THE WITNESS: Your Honor, I would prefer not to bring in the name, but if it is important —

JUDGE ALDRICH: What is the relevancy?

MR. BEHAR: Well, there will be testimony as to what the physical set-up is at the Parents Aid Society, and in our view, it is relevant to compare structurally what goes on at this particular plaintiff-corporation with what goes on and what exists at a clinic, for example.

[18] JUDGE ALDRICH: Well, we begin right off by saying it is not proper cross-examination of this witness.

MR. BEHAR: May I be heard briefly?

JUDGE ALDRICH: Yes.

MR. BEHAR: I believe on direct examination the witness indicated part of his experience was his association with a clinic in the Boston neighborhood, I think he put it, and it seems to us proper cross-examination is to find out what the experience is at this clinic. I think it reflects upon what his testimony has been.

JUDGE ALDRICH: In what way do the individual persons at this clinic, which the witness would like to respect the privacy of, bear on what you are pointing out?

MR. BEHAR: I am not asking him to identify the names of anybody.

JUDGE ALDRICH: I thought you were.

MR. BEHAR: Just the name of the clinic. I happen to know the name of the clinic. I defended the clinic's position in a lawsuit myself. I am not critical of the clinic. I think bringing the name out does not prejudice anybody.

JUDGE ALDRICH: The witness feels it does.

THE WITNESS: I would prefer not to.

MR. BEHAR: Okay.

[19] Q But you are associated with the clinic?

A That's right.

Q Did you help set policy for this clinic?

A Yes.

Q Medical policy?

A Yes.

Q Was policy set regarding parental consent for procedures performed on minors?

A Of course. We have always had one parent's consent.

Q And you required that?

A Yes.

Q Did you deem it to be good medical practice to have such a requirement?

A At that time it certainly seemed so. This was in 1973.

Q Is this clinic licensed?

A Yes.

Q Can you tell the Court briefly what a licensing procedure is, if you know?

MR. LUCAS: We would object to any inquiry into this because the question of the validity of the licensing statute is at issue before another judge in this court.

JUDGE ALDRICH: I don't take it that that is the purpose of the inquiry. The purpose of the inquiry seems to be either to attack the witness' experience or to support it. I don't know which at the moment.

MR. LUCAS: Whether or not the clinic has complied with [20] licensing requirements, I don't see where that has anything to do with the question we have here.

JUDGE ALDRICH: As to this particular question, I would agree.

MR. BEHAR: Note my objection.

Q Doctor, does the clinic in question have any back-up agreements with any other health care facilities in the Commonwealth?

A Yes, of course. The State, in its regard for the welfare of patients, of medical clients, has established certain policies and has set up various measures and methods to see that these are taken care of. One of these is to have a back-up facility within a few short minutes drive from a clinic if the clinic was in a non-hospital facility.

Q Are these back-up agreements formalized in writing?

MR. LUCAS: Objection. This is irrelevant. He is trying the clinic licensing case.

JUDGE ALDRICH: What do you say?

MR. BEHAR: I am not trying to do anything of the kind. I want to establish from this witness that it is good medical practice, given a given volume of surgical procedures performed at an institution, to have back-up agreements.

JUDGE ALDRICH: He already said he had one. [21] What more do you get?

MR. BEHAR: This plaintiff might not have one.

MR. LUCAS: This is not any more relevant than the type of novocain used at the clinic.

MR. BEHAR: I suggest it is relevant. This is the kind of inquiry a parent, as opposed to a child, might make as to what kind of back-up agreements and what kind of patient safety was involved at a particular institution.

JUDGE ALDRICH: What particular question do you want?

MR. BEHAR: I believe the question I asked was whether the back-up agreement was formalized in writing.

JUDGE ALDRICH: What difference does it make?

MR. BEHAR: In our view, it would show there is an on-going relationship with a hospital. It seems to me that if I were a parent and I were going to have surgery performed on a child, I might want to know what kind of back-up agreements there were in case something went wrong.

MR. LUCAS: It would be our position that this type of regulation has been declared unconstitutional by the Supreme Court because it forbade first trimester clinic regulation. We handed up to the Court earlier a copy of the three-judge court decision specifically declaring this [22] transfer of agreement provision unconstitutional. We would object to inquiry into whether or not this clinic or any other clinic complies with those regulations. It is simply beyond the rights of minors issue.

MR. BEHAR: I will withdraw that question.

JUDGE ALDRICH: Thank you.

Q (By Mr. Baher) Do you know of your own knowledge how many abortions are performed at this clinic per week?

A Per week, about 40 or 50.

Q Is it your best medical judgment that where abortions are being performed in such volume that a back-up arrangement with another health care facility is good medical practice?

A Interestingly enough —

MR. LUCAS: I object to this as being an attempt to circumvent the Court's ruling.

JUDGE ALDRICH: I don't know how much of a ruling we have made. He can answer that question.

THE WITNESS: I'm sorry. Would you repeat the question?

(The following question was read:) "Is it your best medical judgment that where abortions are being performed in such volume that a back-up arrangement with another health care facility is good medical practice?"

THE WITNESS: I certainly agree, but that may [23] not be in writing. In fact —

JUDGE ALDRICH: That answers it.

Q Doctor, in your judgment, would it be good medical practice for a doctor or a clinic to agree to perform an abortion upon a minor on the basis of a ten-minute phone call?

A From my own personal opinion — I don't think I would ever have done that my own self.

Q In your opinion, Doctor, would it be good medical practice for a licensed physician to consult with a patient, a minor patient, before that minor patient signs a consent form?

A No, that is not necessary. In my own clinic the major part of counseling preparation and explanation comes from a social worker who sees the patient and I or the doctor may have no time to see the patient but will depend entirely upon the experience and expertise of those that are preparing the patient.

Q You do not go over the form yourself?

A The form, yes, because there has to be a consent form signed by the patient that she understands what is going to happen.

Q Do you go over that with the patient yourself?

A I or the doctor that is going to do it will.

Q It would be good medical practice to do that?

A I have always done it myself.

[24] Q You indicated that the younger the girl who was pregnant the higher the risk to that pregnancy; it that correct?

A That is correct.

Q Isn't it a fact, Doctor, that pregnancy is only particularly risky relative to 12 and 13 year olds, in that age group?

A Oh, no. It depends entirely on the physical maturity, not the age of the patient. There are many 17 year olds —

Q Isn't it the case, Doctor, that with good prenatal care the pregnancy of, say, a 15 or 16 year old is as safe as that of a 20 year old?

A Well, you see —

Q Can you answer that yes or no?

A No, I can not.

Q Isn't it a fact, Doctor, that pregnancies in late adolescence are as safe as those beyond adolescence?

A If you define adolescence the same way I would, then I would agree.

Q How do you define it?

A I would say that adolescence is from puberty, when the child begins to develop, to full maturity.

Q And if you define adolescence as such — ?

A The later in adolescence, the closer to maturity.

Q And the pregnancy is as safe during that time as it is beyond adolescence?

A Yes. If you say —

[25] Q I think you have answered the question.

JUDGE ALDRICH: I don't think he has.

A Would you define how late in adolescence you mean?

Q Let's take from 16 to 18.

A Would you rather say within six months of being fully mature? It may be any age. Then I would say yes — within six months of being fully mature.

Q But beyond that, you are not prepared to make that statement?

A No.

JUDGE FREEDMAN: Well, haven't you stated on several occasions that the question of danger of an abortion as opposed to carrying through to full term depends upon the physical maturity of the individual rather than the age?

THE WITNESS: Yes, Your Honor.

Q And the same could be said for the risk of an abortion, could it not, namely, that the younger the minor the riskier the procedure, the abortion procedure?

A No, that is not quite right. The risk entails the extent of the pregnancy rather than the age of the patient.

Q You are not saying there is no risk in the abortion procedure?

A There can be a risk to cutting your fingernail. It is not the age of the patient so much as — well, there is surely some connection, as you have suggested, between the [26] risk being greater for any procedure the younger the patient, but that is not as medically important as the extent of the pregnancy.

Q And that goes for pregnancy, too?

A Yes.

Q You have indicated there are risks. Are there risks in your experience in this procedure?

A In any procedure whatsoever.

Q I have not asked you about any procedure. I am asking you about the abortion procedure. Are there medical risks and complications that attach to this procedure?

A Of course.

Q Could you, based on your experience and training, detail for the Court what these are?

A The risks involved in abortion may be a certain amount of temperature reaction, a certain amount of bleeding, cramps or pain. These things may certainly be quite prevalent in any of these procedures.

Q Would there be danger of perforation of the uterus in this procedure?

A That is a remote possibility if the procedure is done by trained physicians.

Q Are there any of these complications that would require hospitalization, Doctor?

A A perforation certainly could. I think this would be [27] very, very unusual and unlikely to happen. Severe bleeding could mean hospitalization or an unknown temperature reaction would perhaps require medical care.

Q In your judgment relative to these complications, if they occur to a minor who had not obtained parental consent for an abortion, in your judgment, do you think the parent ought to be informed relative to the complications once they resulted in hospitalization?

A I would think so.

Q Isn't it a fact, Doctor, that if a parent was notified in a situation where the minor had been hospitalized as a result of complications, the emotional impact on that family would be far more deleterious than it would have been if the parents had been involved at the outset?

A You are presenting a possibility so remote it is hard to answer anything to it. I suppose you can think of situations like that. But, in the first place, the numbers of patients who do not have parental consent and have complications are very, very few. If you were to multiply these rare occasions, I suppose you could find a situation where the answer should be yes to your question.

Q Are you familiar with the term morbidity as used in relation to abortion?

A Yes.

Q Would you tell the Court what you understand that term to [28] mean?

A Morbidity refers to the type of complication that I mentioned, that is, the non-fatal situation of a temperature or an infection or bleeding or something of this sort.

Q Doesn't the term really go beyond the actual complication but looks to long-term effects of the particular complications?

A No, I don't think morbidity has any further meaning than just what I said.

Q You indicated on direct examination that it is important for the gynecologist to deal with the psychological aspects of an abortion situation for a minor. Is that correct?

A Surely.

Q And then you made a comment which I did not understand. You said, and I am quoting, "I'm afraid a lot of gynecologists have other surgical interests in mind." What did you mean by that? You said that not enough doctors really paid attention to the psychological aspects and then you said, "I'm afraid a lot of gynecologists have other surgical interests in mind." What did you mean by that?

A I think I meant —

Q Do you recall saying that?

A I am sure I did if you have got me quoted. I don't remember it. I think I meant that many gynecologists are not very apt to spend much time in the office dealing with purely emotional affairs dealing with the reproductive tract.

[29] Q What are these other surgical interests you had in mind that these doctors might have?

A Well, I think, of course, a hysterectomy is one. Perhaps it is not too often, but a hysterectomy is a usual procedure for a doctor to do.

Q Doctor, I just happened to be reading the Boston Globe of December 4, 1974, and the paper reports a study of gynecologists, and it was done by a gynecologist who toured various hospitals, and he was concerned with tubal ligations and the performance of this procedure, and he indicated that what he termed a significant minority of residents and interns at teaching hospitals were performing these operations unnecessarily and they were doing so because of a deep-seated personal belief regarding overpopulation and what their particular physician regarded as an ideal number of children for any family.

He also indicated these procedures were being performed because of frustration over the millions of dollars spent to support the welfare program.

In your experience, have you become aware of doctors that perform operations for these reasons?

MR. LUCAS: Let me object to that and particularly the use of a newspaper because it lacks any foundation. It is certainly not a scholarly treatise, although it is a good newspaper. I think the question is very [30] ambiguous. It has two or three elements to it.

JUDGE ALDRICH: It seems to me the question could have been put in much simpler language. To that extent, I will sustain the objection. You could have asked him all that without making a speech. I strike the question.

Q Doctor, in your experience, are you aware of physicians, and particularly gynecologists and obstetricians, who perform — well, we will leave it at gynecologists, who perform surgical operations based on personal beliefs, such as aversion to welfare, population control and their conception of what an ideal family size is?

MR. LUCAS: Objection. That question has too many factors in it.

JUDGE ALDRICH: He may answer.

A I don't think any doctor should perform operations for these other issues. We are taught and trained that what we are trying to do is to take care of the health of the patient.

Q Doctor, I did not ask you that. I asked you if you are aware of doctors, either from your own experience or from reading the literature, who, in fact, do that?

A I certainly am aware of all sorts of doctors who are not following the code.

Q And these are the doctors you would have make the decision for the minor on whether to have an abortion?

[31] A Oh, no, not at all. The same group of doctors who would do a hysterectomy without any medical reason for doing it, these are doctors who are not following the training and beliefs and code of ethics that they were brought up to follow.

Q If a patient is encountering a doctor for the first time, that patient is not going to know whether the doctor is one of these doctors you have said is violating the code or one who is perhaps following the code, is she?

A I think she is if she is going to a hospital or a clinic. She is going to trust the organization that she went to.

Q And that trust could be misplaced if the doctor is the wrong kind of doctor who is going to violate the code; is that right? Yes or no?

A I don't know, I guess.

Q You guess?

A Well, would you say that again? It is so clearly obvious — are you saying if she knows she is going to a criminal, would she have trust?

Q She is dependent really upon the doctor, isn't she? She doesn't know. The doctor is not going to have that on the office shingle that he is violating the code, is he?

A Not a criminal doctor.

Q So she is taking a chance?

A If she goes to an illegal abortionist, she is taking a [32] chance, yes.

JUDGE ALDRICH: I think you have gone far enough in arguing your case.

Q Is an abortion properly characterized as a surgical procedure in your judgment?

A Yes.

Q In your judgment is it good medical practice to begin starting the patient on antibiotics immediately preceding an abortion?

MR. LUCAS: Objection as to the details of a particular medical practice. I think the Supreme Court made it clear that the particular practice of the physician in the first trimester is a matter between the physician and the patient. While there may be disagreement over when and at what point to use antibiotics, I don't think it is a proper line of inquiry having to do with the rights of minors.

JUDGE ALDRICH: Do you want to make the same argument there? A girl might go to a crook the way a grownup might go to a crook?

MR. BEHAR: That is part of it, Your Honor.

JUDGE ALDRICH: What else?

MR. BEHAR: Well, in our view, there are different medical procedures that are being utilized. It seems to me that when you have a minor who shows up at a clinic, she is not going to be asking questions.

[33] JUDGE ALDRICH: We will hear that argument when we come to it, but I don't see what you are gaining now except wasting time.

MR. BEHAR: Are you overruling the question?

JUDGE ALDRICH: Yes, because it is argumentative.

MR. BEHAR: Note my objection.

Q In your experience, Doctor, has it ever been necessary for a physician to consult with a minor's family doctor before performing an abortion?

A Indeed, the family doctor may be a very excellent person to talk to, as I have suggested, particularly if the child refuses to involve the parents. I think I mentioned some trained person, even a minister, and the family doctor might be someone we might call in.

Q Would you have occasion to consult a family doctor for medical reasons relative to a minor?

A I think in our clinic anyway we try to see that the client goes back to her family doctor after the procedure if she possibly can. We feel that this is a very good way to follow up.

Q Your experience has been in situations where you have parents present or at least one parent present.

A One parent's consent, yes.

Q During these consultations has it been your experience that [34] a parent is ever able to supply knowledge relative to a minor's medical history that the minor does not have?

A I don't think anything that would be appropriate to the situation. In other words, the fact that the child had chicken pox or something like that is not pertinent.

Q Has a parent ever amplified the history of the child?

A If you know parents, then you know how they talk. Most of it is irrelevant to the problem.

Q But they have provided information in situations where the minor has not been able to?

A Of no significance to the decision, yes.

Q Doctor, do you encounter the situation in your clinical experience, and maybe in your training, where a minor has articulated a fear of involving her parents, and the parents are then informed of her pregnancy, and the fear is not realized?

A I do not happen to remember that particular situation, but I can think of many other situations that would seem to follow the same pattern.

Q In other words, not all the minor's fears come true, is that right?

A Indeed, no, that is true.

Q In fact, on direct testimony you stated, "Often enough the young person is possibly wrong for not wanting to inform her parents"?

[35] A It can happen.

Q Relative to the hospitals and clinics you have been associated with, have they ever had occasion to make referrals to state agencies regarding families they did not regard as suitable for a child?

A For the care of the child?

Q Yes, for the care of the child.

A After an abortion?

Q I mean in general.

A In general, most hospitals have social service departments that are very closely affiliated with state agencies.

Q And in these situations, and oftentimes as a result of hospital intervention, there can be a guardian appointed for a particular minor?

A For a child without —

MR. LUCAS: I object to the relevancy.

JUDGE ALDRICH: You may go ahead.

Q In a situation where that is the case, where, for example, in a situation you posed as being an instance where you did not think it was a good idea for the parents to be informed, that is a retarded mother and an alcoholic father, that would be the kind of a situation where a guardian would be appointed?

A Correct.

Q Do you understand the statute in that situation to require [36] dealing with the guardian or with the parents?

A I don't know the statute. We have had cases just like that, with an older sister —

Q I think you have answered the question. In your view, Doctor, are there any surgical procedures which, in your judgement, a 17 year old can not give an informed consent to?

A Indeed, in my experience and affiliation in hospitals in this town, those procedures that need a total anesthetic, putting the child out with some sort of an anesthetic, all these procedures need some adult consent. I don't know that there

is any law about this, but this is the policy as far as I know. Of course, abortions done under novocain are out of that range.

Q Well, are you saying it is good medical practice to have parental involvement in all situations where there is a general anesthetic?

A Yes, a guardian or parent surrogate, yes.

Q Are there any general procedures not involving a general anesthetic that in your view a 17 year old, for example, could not give an informed consent to?

A I don't know. I would have to think about that. I'm not sure that there are.

Q Is it your view that a 17 year old can give an informed consent to a tubal ligation?

[37] A I think that indeed she could be capable. Let's say older adolescents, rather than age, would be able to give an informed consent.

Q What about the younger adolescents?

A There again, it depends on the child, doesn't it?

Q Well, for the younger adolescent what did you say that as a class younger adolescents could not give an informed consent to a tubal ligation?

A As a class — I would think that tubal ligation is something we do not do for young adolescents. It is wholly out of my medical experience to even consider doing a tubal ligation under a local.

Q I am talking about the ability to appreciate the procedure, whether it should be done or not. Is it your judgment that younger adolescents as a class could give informed consent to that procedure?

A No better than they could a hysterectomy, which is not done. We do not challenge them with the necessity to decide these types of operations. These are elective operations. One

does not even bring them into the problem of the younger adolescent.

Q In your medical experience is sterility a possible consequence of an abortion?

A Oh, no.

Q You would not say that?

[38] A Oh, no, certainly not.

Q If it is done badly?

A Well, if you get an infection, I suppose, this complication, which is rare, I suppose this might have some bearing on some possible sterility, but in general that is not the case.

Q It is not?

A It is very rare.

Q It is very rare?

A Right.

Q Well, in a situation where it is rare and that consequence exists, are you saying younger adolescents as a class can nonetheless consent to a procedure where that is a very real consequence?

A Of course. That is something one talks about when one talks to an adolescent beforehand or the surrogate.

Q Doctor, do you have personal views relative to State regulation of abortion?

A To the State regulation of abortion?

Q Yes.

A Could you help me as to what you mean by State regulation?

Q State statutes that govern the particular procedure.

A As I said before, I feel that that decision has to be a medical decision, that no legislator in the State House [39] can decide whether this particular individual carries a greater risk in carrying through the pregnancy than the minor risk in abortion. I don't see how a law can make this decision. It must be the physician's challenge.

MR. BEHAR: I have no further questions.

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CROSS-EXAMINATION BY MR. REYNOLDS

Q Doctor —

MR. LUCAS: We have not been able to find any appearance for Mr. Reynolds in the record. He has not signed any of the pleadings. I would like that clarified.

MR. REYNOLDS: I think the docket will show that my appearance is in. I met my brother on the occasion of taking a deposition.

JUDGE ALDRICH: Well, if you haven't, then it can be rectified later.

MR. REYNOLDS: Thank you, Your Honor.

Q (By Mr. Reynolds) Good morning, Dr. Sturgis. I am referring, Dr. Sturgis, to what has been marked here as Exhibit 4, which you identified as a statement submitted to the Executive Board of the A.C.O.G. You participated, as I understand it, in the formulation of this document; is that so?

A Correct.

Q The only date I see on the document is April of 1972. [40] Was the document submitted to the Executive Board at or about that particular time?

A I would guess so.

Q Has the Executive Committee passed in any way upon the document which was submitted for their consideration?

A They passed on it in this way, by giving it to their publication to be published in the bulletin. Whether it was the next one or not I'm not sure, but that was their action involved, if you wish, or approval of the Committee.

Q It is your understanding they did approve it?

A They approved of publishing it in the bulletin. As far as I know, the next A.C.O.G. Executive Committee meeting would have been in the spring of the next year.

Q You do not actually know whether they have accepted this as a statement that they want to put out as a position by the College?

A That is correct. I think I made that clear.

Q Doctor, at the time this was formulated, you were talking about minors, you were talking about those who were age 18, 19 and 20; isn't that so?

A I don't recall. Did we say the ages?

Q I don't see any place —

A Indeed, I do remember. We very carefully did not identify the minor by age because we got into a huge hassle in the Committee that you could not say 15 was [41] different from 14 or 17.

Q As part of your common knowledge, you knew at the time you composed this paper that when you used the term minors you were talking about people below the age of 21; is that so?

A Yes.

Q Since that time, you know there has been a change in the legislation here in the Commonwealth of Massachusetts?

A Yes.

Q There has been indeed a change in many places across the land?

A Right.

Q And people age 18, 19 and 20 are no longer considered minors, are they?

A That is correct.

Q You do mention teenagers in this report, do you not?

A Yes.

Q It is correct that when you were formulating your opinions here, you were particularly concerned with an-

nouncing what you considered to be the rights of people age 18, 19 and 20? They were more affected by what you were saying than any other single group?

A That what I am saying here in this court —

Q Yes.

A I don't think we ever considered that, sir, because [42] I was quite aware that you had to be under 18 these days to be considered a minor.

Q At the time you wrote this, it was not 18?

A At the time we wrote this they were included as minors.

Q Didn't you take into account those young women who were age 18, 19 and 20 specifically?

A They were included, although they were not —

Q Thank you very much, Doctor. That answers the question.

Now, you say that in your practice, those that you are associated with, it is part of your regular procedure to obtain the consent — and I assume that is written consent of one parent, is that so?

A Yes.

Q You have no particular quarrel with obtaining the consent of one parent, do you?

A No.

Q As a matter of fact, you said, I think, in the vast majority of cases you do obtain the consent of one parent; isn't that so?

A It happens to be so in our clinic, yes.

Q So far as you know, that is the generally accepted medical practice here in the Commonwealth, isn't it?

A I am not sure about that today because we set out policy before the Supreme Court decision.

[43] Q I'm asking you, sir, about your knowledge of the general medical practice here in the Commonwealth.

A I really haven't that much knowledge to give you.

Q There was one question about your affiliation, and you said you were associated with a local university clinic. By that you meant some clinic here in Suffolk County?

A No. It was a university health agency. I suppose you could call it a clinic.

Q Physically located in Suffolk County?

A No, across the river.

Q If it is across the river, it is over in Middlesex County?

A Right.

Q With regard to surgical procedures on young women under the age of 18, other than an abortion — I am not talking about an abortion — you must, I assume, in your practice perform some surgical procedures on young women under that age other than abortions, isn't that so?

A Under local anesthesia, yes.

Q Isn't it true that in your practice you obtain a written consent of a parent for that?

A Oh, I don't think so. I can think of a paranythia fingernail, or minor things.

Q Anything more significant than that?

A Even more significant than that, in the case of the university health center that you mentioned that I work in [44] many times a boil or something else has to be operated on and the parents are on the other side of the continent.

Q And you can't get in touch with them?

A Yes, and you go ahead.

Q That would be an emergency procedure?

A Absolutely.

Q And it is relatively simple?

A Under local anesthesia. We would not if it were general anesthesia.

Q In your practice isn't it so that hospitals in this area do not remove tonsils or do not remove an appendix without the written consent of a parent?

A Neither of those can be done under local anesthesia.

Q You do get the consent of a parent in those cases?

A Of course, because they need general anesthesia.

Q And whether it is because of that or not, you do, in fact, get consent; isn't that so?

A It goes with what I said. Any general anesthetic has the consent of one parent.

Q Do you know of any situation where, other than where a general anesthetic is used, it is not the customary procedure to get the written consent of the parents?

A Let me see. The procedure that is —

Q A surgical procedure.

A A local procedure that does not need a parent's [45] consent?

Q I am talking about the accepted medical practice as you know it.

A Would you give me another chance? Would you state it again?

Q Surely. I am talking about general medical practice as you know it, and I am talking about situations in which a general anesthetic is not required. I am asking in those circumstances isn't it the case that doctors and hospitals you know of as a regular medical practice obtain the written consent of a parent?

A No. I think frequently — at the Massachusetts General where I worked for some time, oral consent over the telephone was acceptable.

Q Oral consent over the phone?

A Yes.

Q But there is some communication with the parents or there is at least an attempt?

A Well, if it was infected fingernail, I doubt it. It depends on the severity of the surgery.

Q In your paper you refer to the time when the patient is responsibly mature and adamant about not involving her parents. I am zeroing in on this "responsibly mature". You mean by responsibly mature a financial consideration, do you not, Doctor?

[46] A No. The married minor generally is considered responsibly mature. Whether or not she is in the poverty group, she is able to make a decision by law.

Q So you are talking about a female who is married and below age 18. And would you call that person an emancipated female?

A Yes.

Q Other than the emancipated female, a young woman who is married below the age of 18, are you talking about anybody else when you describe them as responsibly mature?

A Yes, because the marriage license really may not have anything to do with your decision as to whether or not she is an emancipated minor.

MR. REYNOLDS: I move that go out, Your Honor. It is not responsive.

JUDGE ALDRICH: I couldn't even hear what your question was.

MR. REYNOLDS: I'm sorry it wasn't heard. I would like it to be heard. May I ask that the court reporter read it back?

JUDGE ALDRICH: Yes.

(The question is read.)

JUDGE ALDRICH: I think you can rephrase that a lot simpler.

Q Doctor, I would like you to keep in mind for the purpose of [47] this question that girls who are married are out of the question.

I am asking you in consideration of your committee, when you used the term "reponsibly mature", who were you talking about? What group of people?

A We were talking about the minor child again.

Q Did you put any parameters on the minor child in your own group?

A Any age?

Q Well, whatever parameters you put on.

A We were talking about the youngster who seems to be adult in her development.

Q No consideration at all as to whether they were age 11 or 22?

A Well, Mr. Reynolds, there are 22 year olds who are retarded as much as 11 year olds. You can not say that age makes a difference.

JUDGE FREEDMAN: Well, someone 22 is not a minor.

THE WITNESS: That is correct.

Q You said in your report of the committee that you were seeking to establish useful guidelines for physicians, and that you had in mind helping your patient as well as the physician and the patient and her parents. What kind of things did you have in mind that would be helpful to the patient and her [48] parents in their relationship to the child?

A I think what we have commented before, that is, that if the parent can be brought in to support the child in the decision, that may be helpful to them both.

Q And, as a matter of fact, you said not only would it or might it be helpful, but you considered that to be helpful in every situation or very nearly so; isn't that the case?

A I can imagine it would be.

Q Doctor, you have said that abortion is a surgical procedure. Would you agree that it is an elective surgical procedure?

A Indeed, yes.

Q In the first trimester abortion situation, in the vast majority of cases presented to you, they are not emergency cases, are they?

A I would not say that because in our clinic we are getting probably 30% in the over the ten weeks duration.

Q Over 30% are over ten weeks?

A Yes.

Q So that 70% are under ten weeks?

A Probably.

Q In the case of those 70%, whether you perform the abortion today or tomorrow or Thursday, it is not going to make any significant difference, is it?

A Not within days, but within weeks, yes.

Q Within a week?

[49] A I'm sorry. Is that a question?

Q Yes, sir.

A I didn't hear it.

Q You said, as I understand it, that you should not go into a period of weeks waiting on this, but you can wait a matter of days.

A A day or two.

Q Would 72 hours be too much?

A The earlier it is done, the easier it is to do. You know that.

Q No, sir, I do not. If somebody presents herself to you and she is six to eight weeks pregnant, it doesn't really matter from the standpoint of morbidity or mortality or risk of any form whether that is performed today or a week from now?

A It is a little easier the earlier it is done.

Q It is easier, but there is no substantial increase in the risk factor, is there?

A Not substantial for a week difference.

Q Do you know of any statistics that support any increase in the risk factor?

A There is a gradual increasing risk involved as the extent of the pregnancy is increased.

Q But on or about the time the first trimester has passed, before that time, that is considered a particularly safe area for the performance of an abortion, isn't that true?

[50] A It is safer than after the first trimester.

Q Doctor, you said in your statement, Exhibit 4, that the people who participated in the preparation of the statement were a committee of physicians and some behavioral scientists, and a legal consultant. Would you identify for us, please, who the legal consultant was that participated in this preparation?

A I'm sorry. I do not have the list. I did not bring with me the list of the Committee. I believe it was someone from the American College of OB/GYN.

Q Maryland College?

A No, American College of Obstetrics and Gynecology. I don't remember the names.

Q How many served on this committee?

A About nine, I think, were on the committee.

Q How many of them were physicians?

A Approximately four, I think. The others were behavioral scientists, Ph.D.'s in behavioral science, and we had one or two social workers also who were Ph.D. people and we had a nurse or two.

Q Several times in the paper you mentioned the modification in the law with respect to the treatment of those who have drug abuse and that minors can now be treated for that.

A Without parental consent.

Q Without parental consent. You are aware, Doctor, that in [51] those cases the financial responsibility of a parent is removed?

A Surely.

Q You know that?

A This state and other states probably also provide this service free.

Q In other words, under our statutes, when somebody is found to be drug addicted, that determination requires a joint determination by at least two physicians. That is one thing, isn't it?

A I am glad to know that. I don't know the wording of the statute exactly. I would assume the physician would try to get a parent in, just the same as for an abortion.

Q I am talking about a specific statute. In that particular framework, that particular area, that problem area, where you have drug abuse, a minor is prohibited from rescinding a contract. Did you know that?

A No.

Q Are you aware of the fact minors in the Commonwealth have the privilege of rescinding a contract?

MR. LUCAS: Objection to that. That is a legal question. In the few cases we have run into, if medical treatment was a necessity, a minor can contract. He is asking a question that is improper because its foundation would not stand up under Massachusetts law.

[52] JUDGE ALDRICH: It seems to me that all you are calling for is the knowledge of the witness. To what extent it may be relevant remains to be seen. He may answer.

A I am so naive legally. I don't know what rescinding what contract refers to. I'm sorry.

Q In other words, the ability of a minor to walk away from a contract she has made.

A What contract she has made?

Q Any contract, a contract to have —

JUDGE ALDRICH: Counsel, I think you are getting far afield. If you have something in mind, ask it.

MR. REYNOLDS: Yes, sir, I am asking about the statute that deals with drug abuse.

JUDGE ALDRICH: And the relevancy escapes me. If you want to ask him something about the statute, go ahead.

Q With regard to Chapter 112, Section 12P, which is what we are talking about here, there is no provision for a minor to rescind this contract, is there?

A This is a legal term. I don't know what you are talking about. I'm sorry. Rescinding a contract has to be defined.

JUDGE ALDRICH: It seems to me that this is a question that could be put in much simpler language. [53] Both you and your precedessor, if I may say so, have to make a speech before they ask a question.

MR. REYNOLDS: I'm sorry, Your Honor. I did not mean to do that.

Q In you paper you present the conclusion that there are three particular serious problems coming out of early sexual activity and that those problems affected the individual and society. Isn't that so?

A Yes.

Q And you meant by society — you had in mind the town in which the girl lives, the community and the state, indeed?

A I presume the community would probably be it.

Q How did you conceive society was affected?

A That the community was affected?

Q Well, society.

A I am just looking at my paragraph here.

Q Page 2.

A Page 2, yes. Of course, it is perfectly clear that what we were talking about was the possibility of venereal disease increasing by early sexual experience and that this was clearly a community hazard of difficulty, the emotional stress and trauma.

Q I gather you support the State's interest and legislation with respect to the treatment of venereal disease?

A The State is very helpful, but parental consent is not [54] required, of course.

Q Later on in your paper you suggest that when a troubled child comes to you and says she has this difficulty or she is pregnant and wants to be aborted and she doesn't want you to tell her parents, you said oftentimes what she really wants is for you to tell her parents, for the physician to tell her parents; is that so?

A If she will give permission, that would be what I would do, yes.

Q Your paper suggests that that is a real situation, that physicians are not often asked to keep a confidence, and as they explore it they found that really what the patient wants is for the doctor to make the call to let the parents know.

A This can be one of the difficult things for a doctor to try to keep in mind.

Q Has that happened to you in your own practice?

A I can't give you chapter and verse, but I imagine so.

Q You would have no objection to playing the part of the kindly informant to the parents, would you?

A I wouldn't do it if the child —

Q I am saying if you determined her position was that actually she was asking you to make the information known.

A I wouldn't have the competence myself in knowing that to be the case.

[55] Q Now, you have on Page 5 a situation where when the physician judges that the girl who refuses to tell her parents is incapable of making a considered decision — it begins that way — you are saying that you do run into those who are incapable of a decision up or down; isn't that correct?

A Of course.

Q And you are saying that in that kind of situation your view of the proper way to handle it is for the physician to step in and to make a decision as to which way — which is best done medically to treat this patient.

A That is not what is said here. The physician should carefully select a medical colleague, a fully qualified and responsible member, and so on, to share his decision.

Q Right. You would make a decision which is your opinion best for the girl who is incapable of a decision, and you would get support from a colleague with regard to the decision that you would make?

A That is what I would recommend.

Q You might take a medical colleague or —

A — a social worker or a clergyman, or whoever.

Q How about a lawyer?

A A lawyer, if he was competent, in my opinion, to deal with this situation.

Q When that kind of decision comes about, do you have in mind the ramifications of the financial aspects of such a [56] decision?

A Well, of course that must come into it.

Q Would it be your view that the physician would make the decision in favor of the abortion, if a child is incapable of a decision, and that the physician ought to shoulder the financial burden?

A I don't think that follows. I think it is mentioned here that appropriate action might be to bring in a social agency, a family counselor or youth counseling service.

Q Suppose in that situation that the family is perfectly capable of paying for the procedure?

A Well, I think that is one of the aspects that should not interfere in the physician's decision as to the medical care of his patient.

Q And because you have a girl who is in your estimation incapable of a decision, your view is that you should nonetheless maintain her confidence and not discuss the condition with her parents?

A Here again, I would want to talk this over with someone else.

Q The party who makes that decision then makes the decision as to whom he would discuss the matter with?

A The physician makes that decision.

Q Would there be any record kept in your view of that?

A Probably. It may well be that the counselor — let's [57] say the girl is mentally incapable of making a decision. It may be that the counselor or the psychologist, or whoever it is, would say, "We have to tell the parents." This would be the decision to be made by them.

Q Let me present this situation to you. You have a girl who is in your view incapable of a decision and she has asked you to keep her confidence, and she is the daughter of a physician. Would that change your mind?

A Well, it would make it very difficult. I would think I would want to get somebody else in on this situation.

Q Is there anything you know of in your practice as a physician which would require the sanctity of confidentiality between the doctor and his youthful patient?

A That would require that to violate that confidence?

Q Yes.

A I would think the incompetent patient, the mentally retarded patient of a degree unable to make an informed consent, would be one of those where one would have to violate, let's say, the confidentiality involved.

Q Is there any code in medicine that says in those circumstances a doctor is obliged to keep a confidence?

A It comes in the Hippocratic oath. I can not quote it exactly, but "he shall not give his patient's confidence." It has been quite a while since I took the oath.

Q Is there anything in the Hippocratic oath with regard to the [58] surgical procedure of aborting or abortion?

A Yes, I think so.

Q Does it prohibit it?

A I can't quote it, but in those days, it was considered probably a moral situation to abort a woman.

MR. LUCAS: This is discussed fully in the Supreme Court decision, the Hippocratic oath.

MR. REYNOLDS: Thank you. I have no further questions.

MR. LUCAS: I will try to keep the re-direct very brief.

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RE-DIRECT EXAMINATION BY MR. LUCAS

Q Doctor, I believe you testified that at the clinic you are associated with they require the consent of one parent normally?

A Yes.

Q Would it complicate matters to require the consent of both parents?

A Yes.

Q In what way would this complicate matters?

A Too often the parents may not be living at the same place. Too often the parents may be in conflict, where the child is closely related to one parent but not the other, and when to insist on telling the other parent may serve [59] to cause considerable marital conflict.

Q In your experience in dealing with minors, how many of the parents are trained gynecologists?

A Very few.

Q How many are trained psychiatrists?

A Parents?

Q Yes.

A Very few.

Q Do many of them have any training in counseling or dealing with the problems of minors?

A Generally not.

Q Do you have any knowledge of the number of patients who call the clinic you are associated with to find out about the parental consent requirement and then go elsewhere?

A That might be a good many. We only —

MR. REYNOLDS: Objection. I don't think it is responsive. May I have the question and answer read?

JUDGE ALDRICH: Yes.

(The question and answer is read.)

MR. REYNOLDS: I defer to Mr. Duffey. That is not what I heard.

JUDGE ALDRICH: Go ahead, Doctor.

THE WITNESS: Yes, I am sure there are a good many. I can't give you the numbers though.

[60] Q I believe you testified an abortion was considered as a surgical procedure. It is considered a minor surgical procedure or a major surgical procedure?

A Minor procedure.

Q Is it one of the most minor surgical procedures in the ACOG characterization of surgical procedure?

A That is correct.

MR. REYNOLDS: I object. He is leading the witness with regard to that.

JUDGE ALDRICH: It is leading.

Q Do minors ever seek out tubal ligations?

A No, I have never known any minors to ask for this.

Q Have you ever known of a minor to seek a hysterectomy?

A No.

Q Does the delay of a week for a minor who is pregnant affect her emotional condition at all? Does it increase or decrease anxiety?

A I think it obviously does. Most minors find the waiting period even of a day or two or three a period of extreme stress. In the minor, the underdeveloped minor, this is a very difficult time for them to go through from a mental point of view.

Q There were some questions asked you concerning an agreement with local hospitals. Is it your experience that emergency rooms accept persons coming there with [61] emergencies with or without a written agreement?

A Indeed, yes. We have had a few complications. They have been taken care of by a hospital that has no written agreement with our clinic.

Q Is abortion sometimes characterized as a medical as opposed to a surgical procedure?

A Medical rather than surgical?

Q Yes.

A There are being developed medical ways of carrying out an abortion, but they are not generally done now.

Q Does a first trimester vacuum abortion involve any cutting on the patient at all?

A No.

Q Have you had any experience, other than with counselors, paramedical personnel, being utilized in abortion clinics?

A I have had no personal experience.

Q Do you know of any instances of family doctors informing parents of a pregnancy when the minor did not want the parents to be informed and breaching their confidence?

A I am sure that could happen. I don't know of any specific time but I could imagine that it could happen.

MR. LUCAS: I have no further questions. Thank you very much.

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[62] RE-CROSS EXAMINATION BY MR. BEHAR

Q I just have a few questions. What is it, Doctor, about general anesthesia that requires parental consent?

A It is that general anesthesia involves a whole lot of new and much more severe risk to the patient, no matter for what it is done, even if it is done for a minor tonsillectomy, still the knocking out of the conscious and the complications of general anesthesia demands consent.

Q Well, the fact that anesthesia is a consideration — that does not go to the ability of the patient to understand what is going on, does it?

A No.

Q The fact that you are using anesthesia has absolutely nothing to do with the ability, emotionally or intellectually, of the patient to understand what is going to happen to him or her?

A Would you characterize what you mean by anesthesia, whether general or local anesthesia?

Q I am talking about general anesthesia. The fact that general anesthesia is being used does not really relate to the ability — or are you saying that it does not relate to the ability of the patient to understand emotionally and intellectually what is about to happen to him or her?

A I think the answer to your question is it does not make any difference.

[63] Q Well, the mere fact a surgical procedure involves general anesthesia, that does not require or that should not be the determining factor whether the parents should be involved?

A Well, it is the determining factor, Mr. Behar. If a general anesthesia is going to be used, then it is necessary to have the parents' consent.

Q Is there something about the use of general anesthesia that makes it impossible for a minor to understand what the procedure is all about?

A Oh, no.

Q So it is just arbitrarily done this way?

A The parental consent for general anesthesia has been developed over the years, I suppose, as a policy, for hospitals, and so on, to insist on this.

Q In the situation where you have a minor who can not make up her mind, and that is the situation you treat in your statement, it is going to take some time to counsel that minor, isn't it?

A It may take some time.

Q It may take a few days?

A Probably not, no.

Q You could just reach a decision right off the bat?

A No. I think you could probably find a counselor readily available to come in that day and help the child make up her mind.

[64] Q You don't think it is a good idea to have the minor think it over?

A Well, it may be an hour or two hours or it may be a day.

Q And there would be delay in that situation?

A We have already covered the delay situation.

Q The delay is going to be beneficial to the minor in that situation because it is going to give her a chance to think things out?

A I think also, as I said before, it is an agonizing situation if there is delay.

Q Does dilation and curettage involve cutting of the patient?

A No.

MR. BEHAR: I have no further questions.

MR. REYNOLDS: No questions.

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RE-DIRECT EXAMINATION BY MR. LUCAS

Q When you have minors coming in that have the parents' consent, under 18, do you find the minors themselves understand the procedure and give an informed consent?

A I think in general, yes.

Q So they could give an informed consent with or without their parents?

A Indeed. Mostly that is the case.

MR. LUCAS: Thank you.

[65] JUDGE ALDRICH: We will take a short recess.

(Recess)

MR. BEHAR: Dr. Hodgson, please.

MR. RILEY: Your Honor, is it permissible for the members of the Massachusetts Bar to sit within the bar enclosure?

JUDGE ALDRICH: Yes.

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JANE E. HODGSON (RECALLED)
CROSS-EXAMINATION BY MR. BEHAR

Q Would you restate your name for the record?

A Jane E. Hodgson.

Q Where do you live?

A 1537 North Fisk Street, St. Paul, Minnesota.

Q You indicated that you were associated with Pre-Term, Washington?

A Right.

Q What years were your association?

A From March of 1972 to December of 1973.

Q Were you paid a salary by Pre-Term?

A Yes.

Q Are babies delivered there?

A No.

Q Was your association with Pre-Term following the court case in Minnesota that your attorney referred to at the [66] earlier hearing?

A Yes.

Q You indicated that you are a counsulter with two free-standing clinics in Massachusetts; is that correct?

A Yes.

JUDGE JULIAN: What kind of clinics?

JUDGE BEHAR: Free-standing clinics?

JUDGE JULIAN: Do we have a definition?

MR. BEHAR: I believe it is just a term that is used to show it is independent of a hospital. There are some clinics associated with a hospital.

JUDGE JULIAN: Very well.

Q Do you have any objection to identifying them for the record?

A I don't know of any reason. Pre-Term of Boston and Charles Circle Clinic.

Q These are both licensed by Massachusetts?

A Yes.

Q Were you paid a salary for your consulting work?

A Yes.

Q During the time that you left Minnesota, your sole source of income was with clinics that performed abortions?

A Well, no, not entirely.

Q Could you amplify?

A I had a private practice for 25 years prior to leaving Minnesota and obviously some of my income still came from [67] my private practice.

Q But the current work you were doing was solely in the clinic connection:

A That is right.

Q Do you know what an abortion center is?

A No, I don't believe I do.

Q When you use the term abortion, which trimester of pregnancy do you refer to?

A I usually specify first or second trimester.

Q Your attorney asked you a number of questions and you used just the word abortion when you responded to those questions.

A Well, the majority of abortions are first trimester. If there is any reason to specify, I would do so.

Q Were the various opinions you gave this Court at the prior hearing limited solely to first trimester abortions?

A If I did not specify, they would be, yes.

Q Thank you. You indicated that you have had experience —

A May I correct that?

Q Yes.

A When I am speaking of abortion in the broad sense, it may well have included mid trimester also in discussing abortion as an issue. I think it would depend entirely on my usage, on the particular sentence. I might have used abortion in a general sense and neglected to have specified both first and second trimester.

[68] Q But generally when you used the term you were referring to first trimester?

A I would say generally, yes.

Q You indicated that you had experience and training in both the medical and psychological aspects of abortion; is that correct?

A Yes.

Q What medical aspects are involved in this training?

A Well, that is rather lengthy. I don't know how much detail you want me to go into. There are books written on it. There are many, many aspects. It takes weeks, actually, of training a physician in not only the technical aspects, the indications for the procedure, the complications, the pre and post-op care, the use of the equipment.

Q Regarding the complications, what are among the ones you focus on in this training?

A The medical complications are really surprisingly few. Most of the complications of the abortion procedure, and I am referring to the first trimester, primarily are delayed in type. In other words, they do not occur until two or three days usually after the procedure. In a series of 10,000 which are recorded, and it just appeared last month in the American Journal of Obstetrics and Gynecology, we noticed the paucity of complications occurring in the first 24 hours. The common complications are hemorrhage, [69] infection and retention of tissue. The incidence of perforation is the only medical complication. That occurs on the average of less than one per thousand.

Q That was in your study?

A Right.

Q Isn't it a fact, Doctor, that there are other studies which indicate that those complications are very considerably higher?

A I don't think there are any that are a qualified study.

Q You, yourself, in the report you are talking about referred to an Australian study.

A That was the purpose of my writing the article — to refute the Australian study because it was so poorly done.

Q So your purpose in doing your study was —

A — to rectify the misinformation.

Q You would not want it though that an abortion was a complicated procedure, would you?

A I would like to have the medical profession know the truth about the abortion procedure because it is still a relatively new procedure and it is important that the scientific facts be assembled and be published.

Q You are not questioning the truth of the Australian study? You are not questioning the integrity of the people who made it, are you?

A Possibly.

Q Isn't it a fact, Doctor, that the reason for your study was [70] to further your own pro-abortion views and try to minimize the complications that attach to this procedure?

A No. I wanted to point out to the profession the hazards, and there are some, and the risks which really do exist. For example, if I may give you one, many of the regulations that were being set up were requiring the provision of blood facilities so that transfusions could be given to these girls, if necessary.

Well, our study revealed in 10,000 cases there were only three transfusions that were required and none of these were given during the first 24 hours, and a subsequent study, in which we reviewed 20,000 cases, pointed out the same fact, that it would be superfluous to require transfusion facilities in an out-patient clinic of this type because while it could occur, it was unlikely.

Q As to the complications, Doctor, you spoke of, do you regard these as being more likely in a younger woman?

A The risks are higher in the younger woman as a rule. May I add something to that?

Q I believe you have answered the question.

JUDGE ALDRICH: No, I don't think so.

A The risk of an abortion procedure increases with the parity of the woman regardless of her age. Parity is the number of pregnancies she has had. This is regardless of her age. That is one big factor. So that from that point [71] of view the young woman would have less risk.

However, the young, undeveloped uterus is harder to dilate. It is a harder procedure. The patients are perhaps not as cooperative. So that on the whole, the risks are higher.

Q Does the term morbidity mean anything to you in the context of abortion?

A Yes.

Q Does the term latent morbidity mean anything to you in the context of abortion?

A No. I don't know what you mean by that.

Q Would you explain what you mean by morbidity?

A Morbidity refers to infection, fever, the after-effects of a surgical procedure. Generally, it implies fever.

Q The complications that you spoke of, do any of those in your experience or from your own training and the literature, do any of those lead to sterility?

A No. They can, but very rarely, no more than a full-term pregnancy would.

Q But the risk is there?

A The risk is always there. Just living —

Q With regard to counseling, is there any special training that you imparted to the physicians you instructed?

A I hope that I did by example.

Q For example, did you recommend counseling be done [72] individually?

A It was done individually.

Q In your experience and training, would individual counseling be good medical practice as opposed to group counseling?

A It has been shown in recent studies that the teenage group responds better to group counseling because of peer pressure being so important in this age group.

Q You mean teenagers being counseled together?

A Yes.

Q You don't mean teenagers and adults?

A No, I mean teenagers. We did have an interesting study at Pre-Term, Washington. We tried to isolate groups of girls under 16 and they had both individual and group counseling and this was very effective.

Q You had both?

A We had both, right.

Q In your judgment, would it be good medical practice to have the group counseling done without any differentiation as to age, the wide spectrum of age?

A No. Women over 20 respond better to individual counseling. That has been shown fairly conclusively.

Q So in your judgment, it would be inappropriate to have a group of both minors and adults?

A Do you mean in the same group?

Q In the same group.

[73] A Yes. I think it would be quite appropriate.

Q You indicated, I believe, on direct examination that it is appropriate for the psychiatrist to play an active day-to-day role in clinic counseling; is that correct?

A It is desirable. It is not always practicable. There are not psychiatrists out in every little town all over the country, but if it is feasible, it is certainly desirable.

Q Why is it desirable?

A Because in any group of patients, you are going to have psychiatric problems where one needs more specialized help.

However, a very interesting study has just been published which shows that there is a higher group of psychiatric problems among the teenage pregnancies that elected to go ahead with their pregnancies than in the aborter group.

Q Yet there are psychological problems that existed in the aborter group?

A Yes. A comparison was recently made from Houston by Dr. Kane.

MR. BEHAR: I object to this.

JUDGE ALDRICH: All right, excluded.

Q In your judgment, should a pregnancy be terminated only for medical reasons?

A One would have to define medical reasons. By medical, if you include emotional, paychiatric, mental [74] well-being, I would say yes.

Q In other words, the mere fact that a woman or a minor is pregnant not in and of itself does not mean the pregnancy should be terminated?

MR. LUCAS: I object to this. This is foreclosed by the Supreme Court decision in Roe v. Wade.

JUDGE ALDRICH: You may answer.

A Obvioulsy not. Many of these patients wish to continue their pregnancy and are encouraged to do so.

Q Is the situation now in medical practice that if a minor gives any reason for wanting to terminate the pregnancy, that is acceptable?

A That is the normal, healthy reaction of the average teenager. She doesn't want to be pregnant. This is essentially a normal type of reaction. The ones who want to continue the pregnancy are the ones that need the psychiatric help.

Q The ones that want —

A The young teenager — I am talking about a single teenager who has not planned a pregnancy, who used no contraception, and finds herself pregnant. The normal reaction is

one of wanting to eliminate that pregnancy as fast as possible.

Q A minor who wants to get pregnant often does, doesn't she?

A I think very, very few teenagers want to get pregnant.

[75] Q Well, a minor who will not use any form of contraception and proceeds to have intercourse oftentimes might unconsciously or for some other reason want to get pregnant? That experience in the literature is clear, isn't it?

A That was in the literature in the past, but the more recent psychiatric literature would indicate that most teenagers do not have a hidden unconscious motivation to get pregnant and where they do have, these are the ones that do need psychiatric help. That is what I am saying. The average teenager who gets pregnant and has not planned it or wilfully so desired, the reason usually is due to society's failure to provide sex education and contraceptive information.

Our permissive society — it is a multi-faceted thing, the teenager herself, particularly the young ones, are not wholly to blame. Society is to blame for this situation.

Q Doctor, regarding the situation that we are concerned with here, informing the parents of a pregnancy, you have indicated it is beneficial to the minor to have the parents involved in this situation?

A Yes.

Q Would you state to the Court what those benefits are?

A Parental support is extremely important in any moment of stress. This is certainly a period of stress for these youngsters. They need all the help they can get.

Q Suppose the minor does not want to tell her parents she is [76] pregnant. Is there any reason she might give that is acceptable to you for not telling the parents?

A I try very hard to persuade the patient.

Q Let me ask you this. Is there any reason a minor might give for not telling the parents that you would not find acceptable?

A I would have to stop and think about that. I would use every possible means to persuade that patient that her parents would be more receptive to the fact than she possibly believes at the time. This is the usual reaction.

Most of these patients want to spare their parents. They may have very great love for them and want to spare their feelings or they have a great sense of guilt over having had sex, and that is why they are trying to shield their parents.

Q Suppose a minor gives as a reason for not telling her parents that she doesn't want them to know she has had intercourse. Would that, in your view, be an appropriate reason?

A No, of course not. I try to explain to the child that —

Q If the minor has no real reason but just a general reluctance —

A Most do not have a real reason.

Q Where there is no real reason, that would not be appropriate?

A No.

[77] Q Let me ask you something else. In your experience have you run across situations where a minor is reluctant to tell a parent because of reason X, whatever that might be, but does in fact tell the parents reason X and the fear of the minor about telling does not come true?

A That is the usual situation, I would say.

Q That is fairly common?

A That is the run of the mill.

Q As a matter of fact, if the minor's reason was taken at face value and the parents were not involved, that minor and her family would have lost the benefit of parental involvement, wouldn't they?

A That's right, but —

Q I think you have answered the question.

A You can get around this business of parental consent by persuasion with the youngster, but it takes time oftentimes and there are a lot who get away, who do not come to the right source, and they obtain services elsewhere, and this manner of delaying the procedure, I think, is something that we have to educate the public to the importance of treating —

MR. BEHAR: I move that this go out, Your Honor.

JUDGE ALDRICH: We do not have a jury here. We will deal with whatever answer you get. The answer may [78] stand.

Q Doctor, in the situation we talked about where the parents are involved and the fears of the minor are not realized, that situation is far more common than the situation where it would be inappropriate in your medical judgment not to tell the parents at all?

A Very much more.

Q Doctor, is it your understanding of accepted medical-legal practice that courts frequently become involved in resolving disputes between parents and minors?

A Yes. It happens rather frequently, not in my own experience.

Q Would you regard it as acceptable medical practice for a doctor or clinic, for example, to agree to the price of an abortion with a minor and to agree to perform the operation on the basis of a ten-minute phone call?

A No.

Q In your judgment, should a doctor be present when a consent form is signed?

A No.

Q Do you think a doctor should review the consent form with the patient?

A Of course.

Q That goes without saying?

A He should know whether or not it has been signed, yes, [79] and know the patient's attitude.

Q Would you agree with Dr. Sturgis — by the way, you were present during his testimony, were you not?

A Yes.

Q Do you agree with Dr. Sturgis that some gynecologists have other surgical interests in mind relative to performing, say, an abortion or sterilization?

A Yes.

Q Thank you, Doctor. In talking about the risk of pregnancy, you indicated that the risks were greater for minors under 18; is that correct?

A Yes.

Q Isn't is a fact, Doctor, that pregnancy in late adolescence is as safe as pregnancies beyond?

A No, it is not.

Q Isn't it a fact that the experience in other countries where customs and what-have-you are different than ours adolescence is an ideal child-bearing age, if you know?

A I think you could find many figures to argue that point.

Q But it is the fact in your experience and from your reading of the literature that some countries regard adolescence, for example, as an ideal child-bearing age?

A What do you mean by adolescence?

Q Sixteen through eighteen.

A No. I would prefer having a patient 21, if I could [80] choose. I would rather deliver all women between 21 and 25 rather than under 21.

Q That is what you would rather do?

A Yes, with my knowledge of the field.

Q You realize there are other views than this?

A Oh, yes, I am sure.

Q In your experience, Doctor, have you ever known of an abortion to be disruptive of the family, an abortion performed on a minor to be disruptive of the family?

A The pregnancy would be disruptive.

Q What about the actual procedure? Suppose the minor elects to go through the route of not having the child but having the abortion. Have you ever known the fallout from that procedure to be disruptive of the parents?

A Of course.

Q You indicated that 12 and 13 year olds were more in need of parental support than, for example, 17 and 18 year olds. Is that correct?

A On the whole, yes.

Q Will you tell the Court the reasons why that is so?

A I think that would be obvious to the Court — immaturity.

Q It is not obvious to me.

A The 12 year old needs more financial and emotional support. Many are simply babies at that age.

[81] Q It is quite clear that there is a correlation between age and emotional and intellectual maturity?

A Obviously. May I add something to that? At this age of 12 and 13, this is the group that often want to keep their pregnancy because they have no idea what a full-term pregnancy and parental responsibility involves. This is the group where you do need psychiatric help and where you do have to have parental involvement, if possible.

Q A trained psychiatrist, I assume?

A Yes.

Q That would be clear in your view?

A Yes, in that age group.

Q Have you encountered minor females in the age group 12 through 17 who could not give an informed consent in your judgment?

A Yes.

Q You indicated on direct examination, I believe, that the availability of elective abortion was accepted by national med-

ical organizations in obstetrics and gynecology; is that correct?

A Yes.

Q The acceptance by these groups did not really treat the situation we are confronted with here, the minor's situation and parental consent?

A Yes, there is a recent statement by the Association of [82] Children's Hospitals — the minor giving her own consent to an abortion.

JUDGE JULIAN: Is that available to the public?

THE WITNESS: Yes. It was published in February of this year. I believe, Mr. Lucas, you have a copy.

MR. LUCAS: Yes. When we get to the re-direct, we will introduce it. We have a number of extra copies.

Q In your view, is an abortion properly characterized as a surgical procedure?

A Yes.

Q In your experience has it been necessary for a physician who is about to perform an abortion to consult a family doctor as to some aspects of the medical history of a minor?

A It is often very desirable.

Q In your experience, Doctor, have parents ever been able to supply medical background for a minor that the minor herself could not supply?

A Very, very rarely.

Q In your judgment, are there any surgical procedures that a 17 year old could not give an informed consent to?

A Sterilization.

Q You would say in that situation a 17 year old could not?

A I feel that way intuitively.

[83] Q Would that be an appreciation for the consequences?

A Yes, that's right. I don't think most 17 year olds know how they are going to feel about reproduction at the age of

30. There might be extenuating circumstances in which a 17 year old could make that decision, but I wouldn't want to do the procedure.

Q If a 17 year old came in and said, "I would like to have a tubal ligation because I just don't want to bring children into the world", you wouldn't think that judgment ought to be followed through?

A No, I wouldn't want to do it.

Q Doctor, you personally have very strong views pro-abortion, don't you?

A Yes.

Q And you also have strong personal feelings on the subject?

JUDGE ALDRICH: I didn't get the question.

Q You also have strong personal feelings on the subject, do you not?

A I guess most people would think so.

Q And those feelings are completely in favor of the procedure, are they not?

A I abhor the procedure. I look forward to the day when we can eliminate it completely, if that day ever comes, but it is the lesser of two evils in our society.

Q In your judgment?

[84] A In my judgment it is the lesser of two evils.

Q Have you been able, in giving the various opinions you have given to the Court, to separate out your personal feelings from your medical judgment?

A I don't think that is possible.

MR. BEHAR: I have no further questions.

JUDGE FREEDMAN: Based on the questions regarding your medical opinion and your personal feelings, I would ask the further question: Are your personal feelings based upon your medical experience and judgment?

THE WITNESS: Entirely. I had quite opposite opinions 25 years ago.

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CROSS-EXAMINATION BY MR. REYNOLDS

Q Doctor, my recollection is you testified on direct examination to having supervised something on the order of 25,000 first trimester abortions of young women in the last two years?

A That is correct.

Q And approximately 11% of those were young women under the age of 18?

A Right.

Q Would that be about 12,500 each year?

A Well, perhaps, yes.

Q With regard to those young women under the age of 18, [85] in each instance you had received a parent's consent to perform the abortion; isn't that correct?

A The procedure was that the patient could bring in the parent's signature. There was no notarization of that signature. This policy was set up before I went to Washington, and there was no law on the books, no legal statute at that time, in the District of Columbia, requiring parental consent, and very recently a law has been passed eliminating the necessity for it.

Q During the time when you supervised these 25,000 abortions, and about 11% were under the age of 18, during that time a consent form, a written form, was required?

A Yes.

Q And whether or not they were actually signed by the parent, you don't know that?

A I doubt very much if they always were.

Q So as far as you know, there was no particular statutory requirement at that time?

A At that time, right.

Q But you wouldn't do it without the consent form being signed?

A Right.

Q Did you turn away any in that category, that is, under age 25, during that time for failure to obtain parental consent?

A We turned away a number every week, almost daily.

Q Let me ask you about those that were turned away. How [86] many within a week were turned away?

A I would estimate at least a dozen.

Q Did some of those return later on?

A Yes. Perhaps another dozen would be referred for psychiatric help or special counseling, but some of those came back. I can't tell you what percentage.

Q Based upon your own experience as a practicing physician, the vast amount of your practice with regard to abortions has included the requirement of parental consent?

A Yes.

Q You find that parental involvement in the decision is desirable?

A Right.

Q In your testimony you reported that some young women under the age of 18 did not have financial responsibility.

A I am sure there were.

Q Isn't it your experience that most, if not all, young women below the age of 18 are still in the process of acquiring an education?

A Yes.

Q And that most of those young women under the age of 18 who are not married make their home under their father's roof or mother's roof?

A Yes.

Q Isn't it so that you find there is a great capacity on the part of the parents who have a daughter in that group to be [87] understanding and to in fact be supportive and helpful?

A Yes.

Q You, yourself, are a mother of two daughters, as I recall your direct testimony.

A Yes.

Q One is a teenager?

A Yes.

Q As the mother of a teenager, you would, I assume, wish to be informed of any abortion decision she made?

A I would be, I am sure.

MR. REYNOLDS: Thank you, Doctor.

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RE-DIRECT EXAMINATION BY MR. LUCAS

Q Doctor, were most of your opinions on abortion formed at a time when abortion was illegal?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

Q At the time you formed your opinions, your pro-abortion opinions, you were not able to do abortions because they could not be done in medical practice?

MR. REYNOLDS: Objection.

MR. BEHAR: Objection. This witness has testified as to opinions, I assume, she holds today.

JUDGE ALDRICH: I think he is relating to the last two questions you asked on cross-examination. I don't [88] know why he can't bring out a time sequence on it.

Q When did you first form your opinions on the desirability of having elective abortions for minors?

A It is hard to pinpoint it. My feelings gradually evolved over the years by having been so frustrated in dealing with problem pregnancies of women of all ages, and I began to realize that our law was bad and that abortion services should be made available.

Q Was the issue of parental consent involved in the test case you brought in Minnesota?

A No.

Q Did you have anything to gain personally from eliminating the parental consent requirement?

A Nothing. It has never been a problem to me except it is a delaying factor. It is an impediment, one more impediment which may throw the teenager into the second trimester. that is my chief objection to it.

Q Has most of your experience at Pre-Term had to do with the requirement of one parent as opposed to two parents?

A Just one.

Q How would it affect the difficulty for the patient if you had to have the consent of both parents?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: That is the same set of [89] questions that has been asked on cross-examination. I consider the answer to both irrelevant — if not irrelevant for the case, irrelevant from the standpoint of the witness.

If that troubles you, Mr. Reynolds, it is harder to draw two aces in your poker hand than it is one.

Q Doctor Hodgson, if only one minor in the United States could not get parental consent, would that still interfere with obtaining an abortion?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Excluded.

Q You indicated you have done some studying of the problem of psychological reaction to abortion versus delivery. Would you describe what your findings were on that subject?

A I was citing a work published recently from Houston by Dr. Kane, Chief of Psychiatry.

MR. BEHAR: I object. I believe the question was what she had found. Now we are dealing with some study she is referring to.

MR. LUCAS: The question had to do with her study of the literature.

JUDGE ALDRICH: Our problem may be answered in that respect because I think the defendants have asked both witnesses, and particularly this witness, about familiarity with the literature about a half dozen times. [90] You may proceed.

Q You may answer the question.

A This was a study of a group of teenagers who were pregnant. It compared the aborters with the non-aborters. It was interesting that the non-aborters, the girls that wished to carry their pregnancy to term, were the ones that really were psychiatrically disturbed, and in need of psychiatric help, and the authors concluded that we were concentrating our psychiatric services at the wrong place, that it was a normal, healthy reaction for the teenager to seek an abortion. It was not for them to attempt to continue the pregnancy.

Q Even with minors whose parents will give consent, does parental involvement as to consent involve delay?

A Yes.

Q Is one of the concerns of minor patients coming to a clinic the fear of parental reaction?

JUDGE ALDRICH: Didn't the doctor testify to that already on direct?

MR. LUCAS: She may have.

JUDGE ALDRICH: I thought so.

Q In your experience, have you encountered minors whose parents were gynecologists?

A Yes, very few.

Q Have you encountered minors whose parents were psychologists [91] or psychiatrists?

A A few.

Q I believe you indicated that you didn't think some minors could give an informed consent to tubal ligation.

A yes.

Q Is that in irreversible procedure gynecologically speaking?

A Yes.

Q Is an abortion an irreversible procedure?

A No.

Q Is it possible for a minor to come back and have a child a year later if she decides to do so?

A Yes.

JUDGE JULIAN: The abortion itself is irreversible.

MR. LUCAS: In terms of child bearing capacity — that is what I meant. I have no further questions.

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RE-CROSS EXAMINATION BY MR. BEHAR

Q In the rare situation sterility results as a result of complications from an abortion and then the procedure is irreversible relative to future childbearing?

A Yes.

Q Do you agree with Dr. Sturgis that a mid-trimester abortion is safer than a first trimester abortion?

A No. I do not. I don't think Dr. Sturgis made that[92] statement.

JUDGE ALDRICH: I don't know about Judge Julian, but Judge Freedman and I do not remember him saying that.

MR. BEHAR: I was surprised by the answer.

JUDGE ALDRICH: I would have been surprised if I had heard it.

Q As a parent, do you have any idea how you would feel if your daughter went and had an abortion without your consent and you discovered it later?

A I would feel I had failed as a mother, although it would depend on her motives. Possibly she would want to protect me, but I don't think it would happen. I feel my communication is better with my daughter than that. I think I would be the first one to know.

Q You indicated that the parental consent law in your view was an impediment.

A From the standpoint of time it is an impediment, yes.

Q There is no question about the principle?

A No question about the principle, no.

Q As far as time goes, if you have a situation where a minor is ambivalent as to the procedure, isn't it going to take time to resolve that ambivalence?

A Yes. In the case of ambivalence, no one would want to do the procedure on an ambivalent.

[93] Q Where there is a judgment by the physician that the minor might not really understand what is going on, it is going to take some time to work those things out?

A Obviously.

Q And it is going to require, as you indicated, a trained psychiatrist to resolve it?

A Right. Some of the delays are absolutely necessary.

MR. BEHAR: I have no further questions.

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RE-CROSS EXAMINATION BY MR. REYNOLDS

Q Doctor, did Dr. Sturgis testify that the second trimester was simpler rather than safer?

A I believe that is right.

Q Would you kindly identify the study to which you have made reference?

A Which study?

Q The recent one that was published.

A About comparing the aborters and non-aborters?

Q Yes.

A That is in the American Journal of Psychiatry for 1973 entitled "Teenage Pregnancies - Aborters versus Non-Aborters" or something like that, by Dr. Kane.

Q Would that be October of 1973?

A Right.

MR. REYNOLDS: Thank you.

[94] MR. LUCAS: I have enough copies for the Court and counsel. I would like to have this marked.

MR. REYNOLDS: May I inquire what this is being marked for?

MR. LUCAS: For identification at this time.

(Plaintiffs' Exhibit 8 for Identification.)

Q Would you please identify that document, Dr. Hodgson?

A This is the release of a statement made by the National Association of Children's Hospitals and Related Institutions.

Q Is the statement itself attached to it?

A Yes. Pediatric Bill of Rights is attached to the news release. I believe it is a news release.

Q Is that a true and accurate copy of the Pediatric Bill of Rights, as far as you could tell?

A Yes, it is.

Q Is it a nationally accepted policy statement with regard to medical treatment of minors?

A I hope it would be nationally accepted. It is still relatively new.

MR. LUCAS: I would like to move the admission of this exhibit as evidence of national standards with regard to medical treatment of minors.

MR. REYNOLDS: I object to it. I think it is an unusual procedure to introduce this on re-direct.

[95] JUDGE ALDRICH: Well, it might help me a little. Does this relate to the cross-examination?

MR. LUCAS: It does. It was brought up on cross.

JUDGE ALDRICH: That is what I thought. I thought the doctor was cross-examined at some length on this or, rather, she answered at some length, perhaps unexpectedly from the standpoint of the examiner.

JUDGE JULIAN: This purports to be the National Association of Children's Hospitals and Related Institutions, Inc. I don't know what this corporate entity is or what particular type of institution it is or what it encompasses. For all I know, it may be a corporation with one or two or three hospitals involved in it.

JUDGE ALDRICH: We won't take it. Return it, please.

Are counsel through with this witness?

MR. REYNOLDS: I am.

MR. LUCAS: Yes, Your Honor.

JUDGE ALDRICH: Two o'clock.

(Recess)

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[96] (AFTERNOON SESSION:)
(2:00 P.M.)

MR. BEHAR: Professor Nadelson, please.

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CAROL NADELSON (RECALLED)
CROSS-EXAMINATION BY MR. BEHAR

Q Would you please restate your name for the record?

A Carol Nadelson.

Q Is it your view, Doctor, that a woman who is faced with a decision as to whether to have an abortion needs counseling by knowledgeable, experienced people who are able to explore the alternatives with her objectively and sensitively?

A Yes.

Q Is counseling by knowledgeable, experienced and objective people even more important?

MR. LUCAS: Objection. I would like a definition of knowledgeable and experienced people.

JUDGE JULIAN: He appears to be reading something. Are you reading from the testimony given in the case hitherto?

MR. BEHAR: No, I am not.

JUDGE ALDRICH: Would you clarify what you mean?

MR. BEHAR: I am referring to a letter this witness has written to a newspaper.

[97] JUDGE ALDRICH: All right. The objection is overruled.

Q I ask you, Doctor, is counseling by knowledgeable, experienced and objective people even more important in the situation of a minor?

A Yes.

Q Why would that be?

A I think minors are a higher risk, in terms especially of repeating the same situation, if they do not have adequate counseling.

Q This repetition is a standard psychological phenomenon, repetition compulsion?

A No.

Q That is not what you are referring to?

A No.

Q Why should there be counseling at all relative to an abortion decision?

A I think people need to be aware of all of the alternatives that face them and the implications of each of them as well as what future alternatives there are for family planning, etc.

Q You don't routinely counsel every minor who is going to have an appendectomy at Beth Israel?

A No.

Q Why is this particular procedure singled out?

A It is difficult to have two appendectomies. It is a [98] procedure that happens once. That does not have anything to do with one's choice in the matter of getting pregnant.

Q It is the possible frequency of recurrence that requires counseling. Is that what you are saying?

A That is one aspect of it, yes.

Q Are there other aspects?

A Of pregnancy?

Q Of why counseling at all.

A Because counseling usually occurs in a setting of some kind of either internal psychological or family turmoil or sometimes it results from external pressure which adolescents may not be able to understand completely or cope with.

Q If I were to characterize counseling as non-directive and exploratory, would you know what I meant?

A I would, but I don't know if anybody else would.

Q Would you explain what those terms mean to you?

A I assume what you are talking about is counseling where the counselor asks the person to describe and discuss what her feelings are and how she understands her situation, and talks about why it happened and what happened without the counselor intervening with the counselor's value judgments.

Q That is correct. That is what I was referring to. Doctor, in your judgment, is this kind of non-directive, exploratory counseling the kind of counseling that you give in the abortion [99] context?

A That is one aspect of it.

Q That is one aspect. Are there others?

A There are times when a teenager has to be counseled in terms of contraceptive use, which is fairly direct and explicit.

Q But that is the contraceptive situation.

A That is all part of the counseling situation though.

Q As to the aspect of counseling that concerns abortion, you would say that good medical practice would be to engage in exploratory and directive counseling?

A I am afraid we are not on the same wave length about this. I don't quite understand.

Q In the abortion situation, is it important for the counselor not to interject his or her own views in the matter?

A Yes.

Q Is didactic counseling in your opinion improper medical practice in the situation?

A I believe that I said that a certain aspect of counseling is directive. Since it involves what occurs when one has a pregnancy and one has an abortion, those are facts that one should be able to communicate in the counseling situation, so they are directive.

Q Besides explaining the procedure, and we're dealing with an emotional issue that might be at issue, is it fair to say that [100] good medical practice would not require didactic counseling?

A Would you define didactic?

Q Getting across the counselor's point of view.

A That is different than didactic. You mean the counselor's point of view?

Q Yes, that's right.

A I would say that one should not intervene with one's own point of view.

Q What are the possible detrimental effects of counseling where the counselor's point of view is projected upon the minor who is confronted with an abortion decision?

A That would be to put the minor in the same situation as the minor is often put in at home, which is that somebody else is just telling the person what to do, and they don't have any sense of what it is that the issue means for them or what they need to do in that situation.

Q Do you have an opinion as to whether a person who has strong moral feelings against abortion could be an effective counselor?

A I think that person can be if that person is aware of those feelings and has been careful not to allow them to interfere in the situation. I would doubt if it happened, but it is certainly possible.

Q You have indicated that counselors should be knowledgeable.

A Yes.

[101] Q What do you understand a knowledgeable counselor to be?

A A knowledgeable counselor is someone who has some familiarity with basic psychological principles, who knows something about interview technique, who has familiarity with the developmental issues at any age, and knows something about pregnancy and contraception, and who knows something about the indications and contra-indications in the situation.

Q You, yourself have had training in this regard?

A Yes.

Q It is possible to get training?

A Surely.

Q Here in Massachusetts?

A Yes.

Q Can you give us some schools where this kind of training is available?

A We certainly train our people at the hospital. These are staff people who do counseling, social workers, for example, and the Planned Parenthood certainly does an excellent job.

Q Educational facilities?

A Do you mean universities?

Q Well, is it possible to get formal training to be a counselor?

A By formal, what do you mean?

Q Associated with a school.

[102] A Do you mean to get a bachelor's degree or something like that?

Q Or to receive instructions from courses at a school in these kinds of counseling techniques we are talking about.

A Do you mean in abortion counseling?

Q That's right.

A Not that I know of.

Q When you use the term abortion, are you referring to any particular trimester?

A I wasn't at the time.

Q Were you referring to all trimesters?

A I was referring to the time when one does abortions, which is within the first and second trimester.

Q So you are not referring to the third trimester in any circumstances?

A No.

Q Just the first two?

A Yes.

Q Does the term abortion center have any meaning for you?

A Abortion center?

Q Yes.

A I suppose what you would mean would be a place where people do abortions.

Q Does Beth Israel have a policy regarding the performing of abortions on minors relative to parental consent?

[103] A I can answer more specifically up until last January. There have been some changes. The policy has always been the same as for any operative procedure which requires parental consent for any minor.

Q Is this a written policy at the hospital?

A I assume it is.

Q You indicated on direct testimony that parental consent can cause delay in this procedure which could cause some sort of emotional upset in a minor.

A Yes.

Q Isn't it a fact, Doctor, that if the situation is hurried in some cases, that that can lead to a long-term unfavorable resolution of a minor's dilemma?

A I think you are posing two situations that are difficult to untangle. In the situation of a pregnancy one is weighing one risk against another.

Q Let us take the situation where the physician has the feeling that the minor does not appreciate what is going on, the minor who desires an abortion.

In your view, if that decision is hurried, isn't it likely that there would be long-term detrimental effects to that minor, if the decision is hurried?

A Again, it depends on what you mean by long-term detrimental effects.

Q Let's say a week.

[104] A A week's delay? Well, if it were a 19 week pregnancy or 20 weeks, then a week would make it very difficult. If you were at 12 weeks and you were going into the 13th, you would be weighing the physical risk against an emotional risk.

Q Doctor —

JUDGE JULIAN: It would be better if you did not interrupt the witness. Would you continue, Doctor?

THE WITNESS: What I was referring to was that one is never making a clear-cut decision on the basis of one factor. One always has to consider all the issues involved. If the minor has to have a saline abortion rather that a suction abortion, there is a physical as well as an emotional difference, so it would depend on what the particular circumstances are.

Q If the physician senses an ambivalence on the part of the minor, would it be in the best interests of the minor to rush the abortion decision with that kind of analysis of her situation?

A It would not be unless there were some other extenuating circumstances.

Q How is the counseling done by you at Beth Israel Hospital? Is it individually?

A Yes.

Q Is there any group counseling?

[105] A There is none.

Q Do you have an opinion as to whether group counseling, where minors and adults are intermingled, would be acceptable medical practice relative to a minor faced with an abortion decision?

A I would think it would be rather difficult.

Q How much time do you spend with a patient counseling her?

A As a counselor?

Q Yes.

A I do not do counseling at this moment.

Q You did, though, in the past?

A Yes.

Q What was the time that you spent individually with your patients?

A I usually spent at least an hour with each person.

Q Do you regard that as a basic minimum requirement, that kind of contact, over a period of time?

A I would think so, except that is not the only part of the counseling procedure.

Q So there is more beyond the hour?

A Yes.

Q There is more beyond the individual hour of the doctor-patient contact?

A Yes.

Q Did you do a psychiatric evaluation under the older law in [106] Massachusetts?

A Yes, I did.

Q Did you ever refuse to recommend a patient for an abortion under the old law?

A Yes.

Q Can you indicate the reasons for that refusal?

A It is difficult to think back on a specific instance. Most of the time, as I recall, and I can't be terribly specific, it was related to the person's ambivalence and my feeling that the person was not sure about what they wanted or, in fact, wanted something else. This is more often true in minors than in adults.

Q Do you encounter minors who have some ambivalence as to the abortion procedure because of religious reasons?

A Sometimes.

Q Can you be illustrative of what kind of situations you come in contact with?

A It most often involves a family issue where the teenager believes her family feels one way and she feels the other way and she is afraid of what will happen in her family situation. That is usually what one sees.

Occasionally, one sees a teenager who is troubled about the morality issue, but that is not as frequent as the former. By the time we see people, usually they have thought about it a great deal. They do not make an instant, [107] impulsive decision.

Q I take it that some of the counseling you do is on contraception?

A Yes.

Q Do you think it good medical practice in counseling a patient, who may or may not have religious concerns about abortion, to refer to the rhythm method of contraception as "Birth Control Vatican Roulette"?

A Do I personally? No, I don't.

Q Do you think it good medical practice, consistent with objective counseling, to refer to the Pope's pronouncement on abortion by stating that his concept of solving the problem is rather backward?

JUDGE ALDRICH: Do you think this is pertinent cross-examination?

MR. LUCAS: I object. It is beyond the field of proper cross-examination as to the rights of minors.

JUDGE ALDRICH: I am asking Mr. Behar. Do you think this is pertinent cross-examination?

MR. BEHAR: I think it is pertinent to establish what is good medical practice in the counseling situation.

JUDGE ALDRICH: Choice of words, semantics, language? What has it got to do with medical practice?

MR. BEHAR: There has been testimony from every witness that we have had that counseling is an important [108] part of this situation and that objective counseling is

necessary, and I suggest that when some of the named plaintiffs take the stand, we might find some of the counseling that has been given is not exactly that.

JUDGE ALDRICH: That may be so, but that is not presently before us.

MR. LUCAS: We would submit to you —

JUDGE ALDRICH: Your objection is sustained.

Q Does psychiatry break down life into developmental periods?

A It doesn't specifically deal with that issue except psychologically.

Q Well, to the extent that it deals with it psychologically, is it fair to say there are developmental periods?

A Yes.

Q This is standard psychological and psychiatric methodology?

A Well, yes.

Q For the ages 11 through 18, are there any specific developmental periods that you can isolate?

A One usually refers to that as adolescence or pre-adolescence. The beginning and the end of adolescence are really not clearly definable. One can use a chronological model or one can decide on the basis of physical maturity. It really is variable.

Q But it is standard psychiatric and psychological methodology to segment that area of life into developmental periods?

[109] A Yes.

Q There is early adolescence?

A Yes.

Q And there is later adolescence, is there not?

A Yes.

Q Isn't it a fact, Doctor, that in a given developmental period there are different psychological and emotional goals?

A Yes.

JUDGE JULIAN: Some what?

MR. BEHAR: Goals, g-o-a-l-s, psychological and emotional goals.

JUDGE ALDRICH: I'm sorry, but I still don't have the word.

MR. BEHAR: Goals, g-o-a-l-s.

JUDGE ALDRICH: Thank you.

Q What would be in your judgment some of the psychological and emotional goals in early adolescence?

A I would look at adolescence as a developmental spectrum where there are certain goals for the whole period and the dividing of adolescence into early and late is a kind of convenience which has to do with the kinds of problems adolescents at those ages have with the goals.

If you are referring to the whole process, there are several major tasks.

Q What would they be?

[110] A They would be the beginning of separation from parental and family ties and the beginning of forming one's own individual identity and one's own goals. Included in that would be social identity and a whole variety of other kinds of personal issues that the adolescent has to work toward.

Q You indicated that the use of the terms early and later adolescence was more a convenience for problems that are associated with a particular age group. Is that right?

A Yes.

Q You nod your head. Is that correct?

A Yes.

Q Isn't it a fact that depending on age, there are different psychological problems that occur?

A Yes.

Q And they are associated with an age group, isn't that the case?

A Yes.

Q Doesn't the fact that psychological methodology breaks down life into developmental periods indicate that there are different degrees of maturity that could be associated with that?

A It depends really on what you mean by maturity.

Q Well, wouldn't you say that the fact we are dealing with, different developmental stages, indicates different degrees of maturity at those stages?

[111] A An adolescent at 13 acting like a 13 year old who is mature.

Q As to one's personal identity and sexual identity, doesn't an abortion have a great impact on those goals, on the realization of those goals?

A There is not much evidence of that.

Q You would disagree with that?

A I would say I really don't know, but there is not very much evidence that that is so.

Q Do you regard an abortion as a potential trauma to the goal of realizing independent gender identity?

A Well, I would have to find out a little bit more about what you really mean.

Q What is it that you don't understand?

A Well, it doesn't have much to do with gender identity. The whole issue of having a pregnancy in the first place is more direct than the end result at that point.

Q The resolution of the pregnancy clearly has an effect on the developmental goals, is that correct?

A Yes.

JUDGE JULIAN: What effect does it have, in your opinion?

THE WITNESS: I think it makes a change in a person's usual life. For example, if a minor continues her pregnancy, she would no longer be an adolescent but a [112] mother.

In addition, that would be a major role shift for her and a big developmental change.

JUDGE JULIAN: If there is a termination of pregnancy, what effect does that have?

THE WITNESS: Termination of the pregnancy might have an effect depending on what it means to her and how she has settled the issue that caused her to be pregnant in the first palce.

JUDGE JULIAN: So there is no answer?

THE WITNESS: No specific answer. It is very individual.

JUDGE JULIAN: Is it because there is a lack of data on the subject?

THE WITNESS: Well, that is one part of it, yes. There is a lack of specific data on teenagers who have had a pregnancy terminated by abortion. There are one or two studies in the literature on the subject. However, I think it is also related to the specific individual and the family dynamics of each case that makes it difficult to give a generalized answer.

Q Isn't it the case, Doctor, that a decision to continue or terminate a pregnancy can be made on many levels?

A Yes.

Q What are some of those levels?

A A person could certainly make a decision that is overt [113] and can say one thing and mean something else. They can certainly be ambivalent, which is characteristic of adolescence anyway.

Q In counseling the minor, do you regard it as important to determine what level the decision is being made at, in a situation where a minor desires to have an abortion?

A I am sure she really understands and wants it versus whether she says one thing and really means another. Yes, I think that is very important.

Q Why is that?

A Because I think if a minor is not at least as certain as a minor can be in such a situation, then she may be ambivalent at another point about the choice she made.

Q If, in fact, there is ambivalence and it is not detected, that can have an adverse consequence for the later development of the minor?

A There is always ambivalence, I think you know that, in every decision, and adolescents are particularly prone to be ambivalent about everything. One has to do the best one can given the situation.

JUDGE FREEDMAN: The mature adolescent, a person 17 or thereabouts, are you saying she is inclined to be ambivalent?

THE WITNESS: It is more common in younger adolescents to be ambivalent about many things. That is [114] part of the developmental process — to have to sort out and learn how to make decisions, and it is very difficult to make a decision, and as adolescents get older, they become better able to do that, and the age variation has to do with the individual variables for the case, but a 17 year old will generally be more able to make a less ambivalent decision that a 13 year old, although there is a wide variation.

JUDGE JULIAN: When you use the word ambivalent, are you giving it the same meaning as uncertain?

THE WITNESS: Yes.

JUDGE FREEDMAN: Do you agree with an earlier witness who stated that the age factor is not as important as the maturity of the individual that is being treated?

THE WITNESS: Yes. I think one can find a 13 year old who is better able to make a decision than a 17 year old.

JUDGE FREEDMAN: Under certain circumstances?

THE WITNESS: Yes.

Q You refer to the situation of the unwanted pregnancy as a crisis situation.

A Yes.

Q Is that a psychological term?

A Yes.

[115] Q What does that mean?

A Well, in the specific instance that I believe you are referring to, it is generally the first time in an adolescent's life that she has had to face a decision where there is a permanent life-long effect and where she has to determine a life goal that may well be immutable.

Q I believe you described the minor in this situation by a variety of terms such as being upset and anxious; is that correct?

A Yes.

Q Is it your testimony that a minor in this situation should be alone in her situation?

A One would hope she would not be.

Q Clearly, she should not be left just to flounder with her fears and anxieties?

A Certainly not.

Q It is certainly the case, Doctor, that parents are typically the ones who are most suited to provide support in this situation?

A Some are and some are not.

JUDGE JULIAN: But generally speaking they are, Doctor?

THE WITNESS: Well, it depends on which population you are talking about. I think one has to be careful about what one really means by parents and what population [116] of people you are talking about. If you look at the people —

JUDGE JULIAN: In our society —

JUDGE ALDRICH: She hasn't finished.

JUDGE JULIAN: She is not answering the question put to her. Would you read the question?

(The following question is read:)

"Q Isn't it the case, Doctor, that parents are typically the ones who are most suited to provide support in this situation?"

JUDGE JULIAN: In our society, speaking generally, as a general proposition.

THE WITNESS: I could say yes. I would really have to qualify that because I think that is an ideal situation. It does not often refer to parents who are in their own stressful situation, who have difficulty with their parental role at certain times of their life or under certain circumstances and they may at times be the worst people that on could talk to because they are so upset.

Q Doesn't any surgical procedure involve some possible psychological problem?

A It can, yes.

JUDGE ALDRICH: I can't hear you, Doctor.

THE WITNESS: It can, yes.

Q There is a natural reaction against invasion of the body, is there not?

[117] A I don't know what you mean.

Q An antipathy to having the body invaded in a surgical procedure.

A Physically or emotionally?

Q Physically.

A Physically, yes.

Q With emotional ramifications?

A Well, it is a stress.

Q Isn't termination of pregnancy really a double psychological problem because you have the typical stressful situation of any surgical procedure plus the interruption of the pregnancy?

A Well, that is a complicated question. It is the same kind of stress as a surgical procedure is. It depends on what the meaning of pregnancy is to the individual, whether that adds to it or not.

Q So it can be a double problem?

A It can be.

Q But need not be?

A But need not be.

Q In your view, should there be any time lapse between counseling and the abortion?

A By time lapse, you mean what?

Q Giving the patient a chance to think things over.

A Well, it would be best if one did not have to rush, yes.

Q Ideally, it is important to have some sort of leeway between [118] the counseling and the actual procedure?

A Yes.

Q In your counseling do you discuss possible psychological reactions to abortion with the minor?

A What are you referring to specifically?

Q Maybe a sense of guilt, a sense of sadness. Do you discuss these as being possible reactions to the experience?

A Yes.

Q Is it important to discuss those kinds of feelings?

A I think it is important, but I think that one has to maintain a perspective about it depending on the individual.

Q But there are individual situations where it would be important to say, "You might feel sad; you might feel guilty"?

A True.

Q In your opinion, Doctor, do the psychological problems that follow abortion occur more dramatically in the young than in older women?

A Well, there is no direct evidence that I can quote to you on that because so little work has been done on it. My impression is that it does not have to do with the age as much as the particular circumstances and the appropriateness of the resolution.

Q In your experience, Doctor, do minors tend to tell a doctor what he wants to hear in the situation when confronted with an abortion?

[119] A Again, I can not answer that as directly as perhaps you would like. It depends on the particular circumstances and what the role of the doctor is in that situation.

Q Isn't there a feeling that many adolescents are happy to have somebody involved in running the show, they come in contact with a doctor and they're happy to have some older figure involved?

A That is sometimes the case. That isn't what I was referring to.

Q What were you referring to?

A In the situation where the doctor is the person who has to make the decision, as under the old rule, as to whether there was some, you know, major reason for an abortion, and you were more likely to have somebody tell you what she thought you wanted to know than one is when they have some more freedom of choice.

Q You have indicated that generally parental involvement is a desirable situation?

A Yes.

Q Does that go for the minor and the parent?

A Yes.

Q Could you elaborate for the Court what the benefits are to both the minor and the parents when they are involved?

A I think it is very important for a minor to have parental support and somebody with her. It is a very [120] important part of feeling loved and cared about, especially if the pregnancy occurred in the context of some question about that, and I think it is an important part of building a relationship between teenagers and their parents or between any two people who have to go through a crisis together. It can really strengthen the relationship.

Q The fact that there might be some reluctance or ambivalence about informing the parents, and the fact that there might be emotional upset when there is information given to

the parents, does not mean that the family can not grow from that experience?

A It depends entirely on the situation.

Q You have known families to in fact grow from the experience?

A Yes.

Q You have indicated that parental involvement is even encouraged at Beth Israel. How is that done?

A Generally, what we do with the teenager is to have a child psychiatrist see her as the counselor, and occasionly we alter the procedure some, and the social worker generally sees one or both parents, depending on what seems to be the wish and the indication, and then often they will be together to talk about where they are going and what is happening, and occasionally they will meet after also.

Q If the minor is reluctant to inform her parents that she is pregnant, is it important to find out why she is reluctant?

[121] A Yes.

Q Why is that?

A I think it is important to have them available if there is any possibility of strengthening the relationship between them, if one thinks there is a benefit.

Q So merely because the minor says, "I don't want to inform my parents I am pregnant" does not mean that the matter should be dropped right there?

A I think one should find out why.

Q Have you encountered situations where minors were reluctant to inform their parents because of particular fears and the fears were not realized?

A Yes.

Q What kind of fears did the minors express that were ultimately not realized?

A Often minors are fearful of being severly reprimanded or

ostracized or punished by their parents. Those are the most frequent fears.

Q And when the parents are informed, these fears are not realized?

A In some cases.

Q Would you say, Doctor, that the incidence of those cases where the fears are not realized is greater than the situations where parents should not be informed?

A Yes.

Q That is clearly the case, right?

A Well, I can't quote figures.

JUDGE JULIAN: Clearly what?

MR. BEHAR: I asked if that was clearly the case.

JUDGE ALDRICH: If what was?

MR. BEHAR: If the incidence where the fears of the minor were not realized were greater than situations where the parents should not be informed.

JUDGE ALDRICH: I don't understand the question.

MR. BEHAR: The witness has answered the question.

JUDGE ALDRICH: Then we will have to find out what the witness understood by the question. When I first heard the question, and Judge Julian and I had the same trouble, I thought you were being asked: when the parents ultimately did learn, whether it was more often the case the fears were not realized then the fears were realized. When I heard the question rephrased or repeated, he is comparing it with cases where the parents were not informed at all.

I don't know how you could compare oranges and lemons.

THE WITNESS: I understood it the way you did.

Q The way the Judge did — that would be your answer?

[123] A Yes.

Q You indicated there were situations where in your judgment the parents should not be informed?

A Yes.

JUDGE ALDRICH: The answer was what?

THE WITNESS: Yes. Q I would ask you, Doctor, whether the incidence of that situation where the parents had not been informed in your judgment is greater than the incidence of situations where the minor's fears were not realized?

A That is complicated. As I understand it, you are asking me to kind of categorize frequencies.

Q That's right. You said you have encountered situations where the fears of the minor are not realized. That occurs with a certain frequency?

A Yes.

Q Then you said that you have encountered situations where you would not want to inform the parents of the minor's pregnancy?

A Yes.

Q Which of those two situations have the greater frequency?

A Well, it is more often the situation where the fears are not realized. I could not give you the figures on that.

JUDGE JULIAN: I would like to put this question to the witness. Doctor, have you had many [124] instances involving a teenage pregnant girl, when the abortion has been performed, without the knowledge or consent of the parents, assuming she has parents?

THE WITNESS: Invariably at least one parent is involved.

JUDGE JULIAN: Have you had any cases where the operation was performed, the abortion was performed, without the consent of either parent?

THE WITNESS: We have had that happen.

JUDGE JULIAN: How many cases have you had?

THE WITNESS: I can't be specific, but —

JUDGE JULIAN: Approximately.

THE WITNESS: I think probably in our hospital it must happen four or five times a year.

JUDGE JULIAN: To your knowledge?

THE WITNESS: Yes. I can not be specific because I do not make the final decision. It is up to the chief of the obstetrics and gynecological service to work with the hospital lawyers, so that it is beyond my contact. I wouldn't know.

JUDGE JULIAN: You really don't know then?

THE WITNESS: I can't be more specific than that.

Q Doctor, in situations where you come in contact with minors and you sense an unstable family situation, have you or the [125] hospital petitioned the State Agency to have a guardian appointed?

A I can't be specific about the legal procedures. I am asked to evaluate someone. If there is the possibility that parental consent should be waived, if the adolescent says, "I will not" or "can not" or whatever, then that becomes part of the evaluation, and then I make a recommendation, and it is acted upon in a certain procedure that has nothing to do with me any more.

Q Is this being treated as an emergency? In other words, I thought you said that no surgical procedure is performed at the hospital unless there is parental consent. Are you saying now that the hospital makes an exception?

A For any kind of procedure where parental consent may not be obtainable.

JUDGE FREEDMAN: This happens four or five times a year?

THE WITNESS: Yes, in this situation.

JUDGE JULIAN: This is where the consent is not obtainable?

THE WITNESS: As I understand it, some kind of waiver is requested but I can not be specific on it.

JUDGE JULIAN: Are you referring to cases where an attempt was made to reach the parents but they could not be reached? Is that what you are talking about?

[126] THE WITNESS: No. Usually it has to do with particular circumstances. I recall one youngster who had a mother in a mental hospital and a father who was an alcoholic and was not available, and she had a brother who was over 21 at the time — this was several years ago — and that was the legal age, and I don't know how the procedure occurred, but he assumed a kind of guardianship and not the parents.

I think that our hospital lawyer can tell you more about how that works.

Q Oftentimes a minor might find it extremely unpleasant to have to inform her parents she is pregnant?

A Yes.

Q Yet that does not mean it is not in her best interest to inform the parents; isn't that so?

A Yes.

Q You testified in some instances it would be harmful to the family relationship if the parents were informed of the minor's pregnancy.

A Yes.

Q Do you have an opinion as to whether it would be more harmful if the parents were informed of the pregnancy as a result of the minor being hospitalized for complications?

A I don't think I can answer that question. Can you [127] clarify it?

Q In a situation where an abortion is performed upon a minor without parental consent and there are complications and the minor is hospitalized and the parents are informed of the reasons for the hospitalization and hence the pregnancy, do you have an opinion as to whether that would be more harmful to the family if the parents learned in that situation?

A I think it is really something that can only be individually determined, but certainly it is one of the considerations that one weighs and discusses and attempts to resolve in allowing such a procedure to occur.

Q You could see how that could be particularly damaging to the family?

A It could be, yes. It is conceivable, but I don't think it is usual.

Q You don't think what?

A It is not the usual situation.

Q In the unusual situation there is a clear potential for harm?

A You are talking about potentiality.

Q Pregnancy carried to term doesn't have to be detrimental to the minor's well-being, does it?

A It doesn't have to be.

Q It may potentially be, right?

A Well, yes.

Q With regard to the age groups we are talking about, 12 [128] through 17, for example, have you encountered minors in these age groups who you felt could not appreciate the medical procedure of an abortion?

A Not after it was explained to them.

Q You have found that everyone could appreciate —?

A No. People have varying capacities for understanding and one has to work harder with people who do not understand as much.

Q In your experience, Doctor, have you ever encountered any minors in the age groups we are talking about who in your judgment could not give an informed consent to this procedure?

A I personally have not. It has happened when someone was defined as mentally retarded.

Q That is the only situation you would posit in your experience?

A In my experience that was the only time I can clearly say that.

Q When you indicated that for minors — that a majority of them were capable of giving an informed consent, doesn't your answer indicate that there is a minority who can not?

A It depends on how one approached the problem. It is a very complicated problem, but if one spends time explaining and informing, then you are doing a different thing than asking someone to make a decision with no information. So that in our situation at the hospital, we work very hard at dealing with the informed consent issue.

[129] Q In your situation at the hospital, it is medically speaking the optimum situation?

A I think it probably is.

Q You are an experienced psychiatrist, right?

A Yes.

Q You have the resources of a teaching hospital?

A Yes.

Q You indicated that in your experience one per cent of the minors had an adverse psychological reaction to an abortion?

A Yes.

Q Isn't that figure very low when compared to the literature?

A The range in the literature is one to thirteen per cent.

JUDGE JULIAN: What is that again?

THE WITNESS: The range in the literature of adverse effects is between one and thirteen per cent, depending on the study, who did it and what they looked for. In minors there is little data, one could hardly even say.

The one reasonably complete study that I know about had a very low incidence. Something like thirteen per cent was

their figure of minors who felt somewhat uncertain that they had made the right choice.

Q The figure that you gave is low?

A That is the figure we would estimate from our work.

Q In your work, you are dealing with a situation where you have [130] parental involvement, as you have testified to before?

A Yes.

Q That might be one reason for the low figure?

A But sometimes one parent and not both.

Q I understand. In your experience is impulsiveness a characteristic of adolescence?

A Yes.

Q Isn't that one reason why parental involvement in important decisions in their lives is important?

A Again, I have to give the same qualification as I did before. I think, yes, it can be, but one has to backtrack onto the issue how they got pregnant in the first place.

Q There are other crises in the adolescent's life, aren't there?

A Yes.

Q Besides the unwanted pregnancy?

A Yes.

JUDGE JULIAN: I did not hear your question.

Q There are other crises in the adolescent's life besides the situation of an unwanted pregnancy?

A Yes.

Q In those situations, isn't it uniformly desirable to have the parents involved?

A Well, I think it depends on the situation, but if a kid gets flunked out of school and the parents are very achievement oriented, they may have a very terrible time with that [131] and be very punitive and they may need some other counseling intervention to help work it out.

Q But still the principle would apply as a general proposition that in a major crisis in the adolescent's life, the parents are necessary?

A Yes.

Q In the situation where you have reluctance about involving the parents, as I understand it — well, is this a situation that is a typical one sociologically?

A When you are talking about parents, I am not sure whether you are referring to a parent or two parents. We see many teenagers who have one parent. The other one is unavailable for one reason or another.

Q Is that a typical situation?

A In our experience it is fairly common.

Q You do have the one parent available?

A One parent, yes.

Q In your judgment is there a difference, Doctor, between understanding a surgical procedure and appreciating the emotional situation?

A Yes.

Q Is it fair to say that with regard to younger adolescents the emotional appreciation may be entirely lacking even though there may be an intellectual understanding of the operation?

A Well, that could be.

[132] Q In your experience, has that been the case?

A No, not very often.

Q But it has occurred?

A Yes.

Q Doctor, isn't it fair to say that you have consistently taken a position in opposition to any State regulation in the area of abortion?

A No.

Q Haven't you, in fact, consistently urged the repeal of all legislation regarding abortion?

A No.

Q Haven't you joined in newspaper ads urging the repeal of the Massachusetts abortion laws?

A Well, the thrust of that, I believe, at this point is to support the Supreme Court decision.

Q Prior to the Supreme Court decision you were fairly outspoken, were you not, in criticism of all state laws applying to abortion?

A I would like to qualify that to have it relate to the medical aspects. I think medical procedures should be medically regulated.

Q That is the basis for your opposition?

A Yes.

Q In most situations that have involved the dispute as to the desirability of State regulation or State involvement, isn't [133] it correct that you have opposed the State involvement?

A Well, I would have to understand what you really mean by involvement.

Q Let us take one recent case, the situation where a doctor at the Boston City Hospital was being prosecuted. You voiced your opposition of that prosecution as stemming from an abortion?

A Yes.

Q Are you aware of what the Government's case is going to be in that case?

A Not fully.

Q So you joined in opposition to this particular prosecution of a doctor without informing yourself of the other side?

A Well, I believe I am fairly well informed about it. My understanding of it has to do with the fact, as I see it, that the Supreme Court made a judgment about a situation and I saw nothing in what he did that was contrary to that judgment.

Q You don't know what the Government's case is going to be in that case?

A I can not specifically tell you the details.

Q It may well be based on eyewitness testimony and other testimony — that there is a case there?

A It is possible, but in my reading of it that was not what I saw.

[134] Q Your reading was based on the doctor's representations?

A And the newspaper reports and other reports that I have read, yes.

Q Isn't it atypical you would make a judgment without informing yourself of the other side's position?

A I have informed myself as completely as any citizen might.

Q You don't know what the Government's case is going to be?

A How would I know that?

MR. BEHAR: I have no further questions.

JUDGE FREEDMAN: Doctor, you stated earlier in cross-examination that by and large the minor's fears of being ostracized or condemned or criticized by the parents when the pregnancy was made known have not occurred.

THE WITNESS: Yes.

JUDGE FREEDMAN: I would like to ask about the minority of the cases in which the fears have been justified. What traumatic experiences have occurred in the family relationship as a result?

THE WITNESS: What we have seen is on occasion a teenager has been asked to leave home, has been refused parental support, has been beaten. There are a whole variety of situations in that range depending, really, on the family circumstances. But those situations [135] do occur. Occasionally, one parent will attempt to deal with it by handling the situation alone fearing the wrath of the other parent.

And we often see a mother come in with a teenager saying, "Don't let my husband know about it because he'll kill her."

JUDGE FREEDMAN: Have further psychiatric or psychological disturbances occurred in the patient as a result?

THE WITNESS: Yes. It is very difficult to follow up this kind of situation because the people only come at certain times in their lives to be seen and we can not follow somebody who does not come, but there are further complications and family splitting.

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CROSS-EXAMINATION BY MR. REYNOLDS

Q Good afternoon, Doctor. Doctor, I believe on direct examination several weeks ago you said a number of the young women come to Beth Israel and are referred through various agencies.

A Yes.

Q Are these agencies of the State Government?

A No.

Q What are the agencies that refer them to you?

A I can't answer that specifically at this point since I [136] no longer have the job that I had last year where I was familiar with the specific details of the agency. I am not current on it.

Q Do you know, Doctor, in the year 1974 the relative magnitude of the number of abortions performed on young women under the age of 18?

A At the Beth Israel?

Q Yes.

A I would have to give you a rough estimate because I do not have the exact figures available, but about 25% of the people we have seen were 18 and under.

Q Eighteen and under?

A Yes.

Q Would that make any difference as to those below 18?

A Well, the figures are broken down that way. That is roughly the way it stands. I can not tell you the number of abortions we did last year, but it was something like 800, between 600 and 800, and 25% of that figure would be 18 and under.

Q You also have maintained at the hospital a clinic for young ladies who make the decision that they would like to carry full term; is that so?

A Yes.

Q How many young ladies opted for that choice in 1974?

A I am not familiar with the figures in that clinic.

[137] Q Do you know what composition the people in that clinic are by way of age? Are they mostly under age 18?

A They all are by definition.

Q Is that a clinic to which they go on a twice a week basis or some regular basis?

A They go on a regular basis. I don't think it is as often as once or twice a week.

Q Who is in charge of that clinic?

A Dr. Perlmutter.

Q What is her first name?

A Johanna.

Q A female doctor?

A Yes.

Q As to those teenagers or young women under 18 that you had occasion to interview, what is their situation? Do most or all of them live at home?

A It is extremely variable. I would say probably most of them do, but not all.

Q Do most of them attend school, public school, below the point where you graduate from high school?

A A fair number are school dropouts, but probably most attend at some intervals anyway.

Q Do any of them work for a living?

A Some.

Q Can you help us with the percentage of those who do work [138] for a living?

A I couldn't give you the figures.

Q You said most of your experience was not related to the evaluation of teenagers who are pregnant. Is that what you said on direct examination?

A Yes.

Q Are you presently concerned with a program dealing with young people who are pregnant? Are you presently working on an abortion program for young women under the age of 18?

A I am presently involved in a project on that, but that is not my primary job presently. It was up until last year.

Q When last year did your job end?

A January 1st.

Q So it would be January 1st of 1973 or 1974?

A January 1st of 1974 was when I took this new position.

Q I take it that Beth Israel Hospital's position is that, so far as you know it, there has to be an informed consent made and it stands neutral as to whether or not the young woman carries to term or aborts, is that correct?

A Yes.

MR. REYNOLDS: Thank you.

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[139]RE-DIRECT EXAMINATION BY MR. LUCAS

Q Doctor, you testified concerning some of the problems that minors have whose fears are realized would be compli-

cated by the requirement of both parents' consent being required.

A Yes.

Q Do you think there would be more minors whose fears were realized under those circumstances?

A Yes.

Q Are there some minors who go to their parents anyhow even before discovering consent is required?

A Yes, there are.

Q Do you find there are some minors who do not need any counseling at all because of their understanding?

A I would say I would be hard put to find a time when that would be true.

Q Do you find a large percentage of the minors coming in have made up their mind whether to have an abortion or not?

A A large percentage have made up their minds. More adults have made up their minds than minors. Most of them are somewhat confused about what to do.

Q Do the minors find it difficult to choose between the alternatives of continuing the pregnancy and terminating the pregnancy? Is that a difficult question?

A It is a difficult decision. Some make it more [140] easily then others.

Q Did you testify that there are even at the present time no college programs that you know of in training abortion counselors?

A Yes, there are some counseling training programs, but not necessarily specifically abortion or pregnancy counseling. That has been done by other agencies.

Q Isn't it true that until recently even medical textbooks did not have a discussion of contraception in them?

A That is true.

Q Amongst counselors or abortion counseling people without any formal degrees in counseling?

A Well, it depends on where the counselor works. At the Beth Israel they are all social workers who have a degree in social work, which would involve training in counseling. There are people who do counseling, I believe, in other agencies who are trained by those agencies and who may not have a degree in counseling.

Q In obtaining a degree in social work, is a person, in the past at least or up until very recently, going to have any exposure to actual abortion counseling? Is that an essential element for the degree?

A Sometimes not.

Q Is extensive experience in abortion counseling an adequate substitute for formal training?

[141] A Yes.

Q Do you find there are differences of opinion among different physicians and psychiatrists about various aspects of the abortion procedure and the methods of counseling?

MR. REYNOLDS: I object to that question.

JUDGE ALDRICH: Is that different from the question you asked, Mr. Reynolds?

MR. REYNOLDS: I don't think I asked her that.

JUDGE ALDRICH: I don't think you did. Mr. Behar certainly did.

MR. REYNOLDS: My point of view is a little bit different from Mr. Behar's point of view. I submit that it is a duplicitious question.

MR. LUCAS: I will withdraw it and ask the question more clearly.

Q Do psychiatrists differ as to the desirability of group versus individual counseling?

A There is very little that has been written about group counseling in this particular situation. I think psychiatrists would agree that counseling is important and necessary.

Q Do you find that some psychiatrists feel that group counseling is better and others feel the other way?

A Yes, I would think so, but the literature is not very abundant in the area of group counseling. There are [142] post-abortion groups. That is different.

Q Would you say there are no current opinions formed as to which is most desirable, group counseling versus individual counseling?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Sustained.

Q Are there any firm opinions formed as to the desirability of group counseling versus individual counseling?

MR. REYNOLDS: Objection. She has answered that question.

JUDGE ALDRICH: If that is your only objection, then you may answer.

A There is very little familiarity that I have with group counseling. In this particular area people favor individual counseling, family counseling.

Q In the context of a group counseling situation, is it possible that the inclusion of adults may facilitate communication among the adults?

MR. BEHAR: I object.

JUDGE JULIAN: That seems to be leading.

Q Are there any circumstances under which it would be reasonable to include both adults and minors in the same group counseling situation?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

[143] JUDGE ALDRICH: If this witness has any opinion, she may give it.

A I think it could be very helpful.

MR. LUCAS: I have no further questions. I believe at the last hearing we did not have Dr. Nadelson's curriculum vita.

I apologize for having it so late. I only have two copies. May this be marked as an exhibit? I move it be admitted as her curriculum vita, detailing her experience and background.

JUDGE ALDRICH: It may be admitted.

(Plaintiff's Exhibit 9 in evidence.)

Q Is this a copy of your curriculum vita?

A Yes, it is.

MR. LUCAS: No further questions of this witness.

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RE-CROSS EXAMINATION BY MR. BEHAR

Q In the situation where you have stated that the minor's fears are realized, isn't it the case that this is extremely rare in your experience?

A No.

Q It is clearly a lot rarer than the situation where fears are not realized?

A Yes.

Q Are you familiar with standard obstetrics textbooks such as [144] Williams on Obstetrics?

A I haven't read it in quite a few years.

Q Don't the textbooks all contain ample descriptions of various contraceptive techniques?

A My edition was in 1957. It had nothing on that at all.

Q At some point in regard to counseling do you think that counselors should be subjected to instruction from someone who does have formal training, such as yourself?

A Formal training, yes. I think there are some variations about what requirement one would have about the qualifications.

Q For formal training?

A Of some kind, yes.

MR. BEHAR: No further questions.

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RE-CROSS EXAMINATION BY MR. REYNOLDS

Q Doctor, I see from this document you are married to Dr. Theodore Nadelson?

A Yes.

Q Is he also a physician?

A Yes.

Q And you have two children?

A Yes.

Q How old are your children?

A Six and eight.

[145] Q Are they boy and girl?

A Yes.

Q As a parent would you wish your child to come to you in the event she found herself to be pregnant?

A I would hope so.

MR. REYNOLDS: Thank you.

JUDGE FREEDMAN: Anything further of this witness?

MR. LUCAS: No further questions.

JUDGE ALDRICH: Do you have more witnesses, Mr. Lucas?

MR. LUCAS: We do have both Dr. Zupnick and Mr. Bill Baird. Their depositions have already been taken, which took approximately a day or a day and a half.

It is our felling that the depositions are an adequate predicate for introducing their evidence.

We would like to move, in lieu of having them testify and further drag out the hearing, that their depositions be accepted as their testimony.

JUDGE ALDRICH: Mr. Behar?

MR. BEHAR: As I indicated at a prior hearing, we would object to that. We think the Court ought to see the witnesses. As you know, discovery is often a wideranging process. These depositions were really just to get information more than anything else and lots of the answers [146] are irrelevant and we think would not be admissible in evidence, and we would object.

MR. REYNOLDS: I join in my brother's objection, if Your Honor please.

JUDGE ALDRICH: I just finished trying a patent case in which the witness' direct examination was put in through the deposition and he was then subjected to cross-examination.

Now, who took the depositions?

MR. BEHAR: We did.

JUDGE ALDRICH: Your position will be sustained. We will hear the witnesses.

MR. LUCAS: The plaintiffs call as their next witness the plaintiff, Dr. Gerald Zupnick.

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GERALD ZUPNICK (SWORN)
DIRECT EXAMINATION BY MR. LUCAS

Q Would you state your name and address?

A Gerald Zupnick, 79 Berkshire Road, Great Neck, New York, 11023.

Q Are you a plaintiff in this lawsuit?

A Yes, I am.

Q What is your current association with the Parents Aid Society?

A I am a contract physician with Parents Aid Society.

[147] Q What does that entail?

A That entails my performance of medical services for Parents Aid Society.

Q Are you associated with Parents Aid Society in New York and in Boston?

A Yes.

Q Are you an employee of Parents Aid Society?

A No, I am not.

Q Would you describe for the Court your background and education, starting with college and through your medical training.

A I received a B.A. degree from Columbia University in New York City in 1964. I received an M.D. degree from the University of Louisville School of Medicine in 1968. I did a straight surgical intership at Emory University Grady Memorial Hospital in Atlanta, Georgia from July, 1968 to June, 1969.

From July, 1969 to July, 1970, I was on the staff of the Emory University School of Medicine, Department of Gynecology and Obstetrics, Division of Family Planning.

Q Are you licensed to practice in the Commonwealth of Massachusetts?

A Yes.

Q Would you tell the Court what other states you are licensed to practice in?

[148] A Kentucky, Georgia, California, Florida, New York, Connecticut and Washington, D.C.

Q Would you describe what your experience has been during abortion procedures?

A I have performed approximately 5,000 first trimester abortions under local anesthesia.

Q At what facilities have you performed these procedures?

A I trained at Williams Services in Manhattan in May of 1972 to December of 1972, and I have been working with the Parents Aid Society since July 1, 1973.

Q Were you aware that around November 1st a law was to come into effect in Massachusets requiring the consent of both parents for abortion procedures for minors under the age of 18?

A Yes.

MR. REYNOLDS: Objection as to the characterization of the law.

JUDGE ALDRICH: We will pay no attention to the characterization. Go ahead.

THE WITNESS: Yes.

Q Were you concerned that this law might be enforced against you in any way?

A Yes.

Q Were you fearful of the possibility of any prosecution?

A Yes, I was.

[149] Q Did anyone ever specifically threaten you with prosecution?

A No.

Q If the law had gone into effect, would you have continued to perform abortion procedures on minors?

A No.

Q Would you have totally stopped doing abortion procedures in Massachusetts if the law had gone into effect?

A No. On minors, I would have.

Q To what extent are you involved in counseling at Parents Aid Society?

A To a minimal extent. I have sat in on various counselors and have listened to their counseling from a medical standpoint. I occasionally get involved with counseling if there seems to be a specific problem with the patient.

Q Do you have control over the medical policy at Parents Aid Society?

A Yes, I do. I am medical director of Parents Aid Society.

Q Do you have control over the counseling policy?

A From a medical standpoint, yes, I do.

Q Have you reviewed the counseling policy from time to time?

A Yes, I have.

Q Approximately how many minor patients have been patients of yours at Parents Aid Society in Boston?

[150] A It is hard to give a specific number. An approximate percentage, I would say, would be about 30% of the patients.

Q What procedure is utilized with these patients to obtain an informed consent?

A Well, as with any patient, the procedure is explained to them, the inherent risks are explained, and it is ascertained whether they understand the procedure and the inherent risks.

Q Are the options between continuing pregnancy and abortion discussed with these minors?

A Most certainly.

Q About how long is the counseling session?

A About two hours.

Q Is this normally conducted by you or some other person?

A Normally, not by myself.

Q Who are the individuals that do most of the counseling?

A In the Boston Parents Aid Society it would be either Mr. Bill Baird or Marilyn Morrissey, an R.N., a registered nurse.

Q Do you then see the patients after they have been counseled?

A Yes, I do. And in terms of counseling, I go through the procedure specifically with each patient prior to the procedure to make sure they understand what is going to happen.

Q Do you describe the procedure to the patient in each step?

[151] A Yes, I do, prior to performing each step.

Q Up to how many weeks are abortions performed at Parents Aid Society?

A Twelve weeks gestation.

Q Are you the only physician who performs abortions there?

A Yes, in Massachusetts.

Q If the patient has any difficulty during counseling, do you ever counsel the patient extensively yourself?

A Yes. I have had occasion to do so, although it is not common.

Q Would the patients in general — do they come through counseling understanding the procedure?

A Yes, they do. I might point out that if they do not, the procedure is not performed until it is felt that the patient does understand the counseling.

Q Are any patients ever turned away?

A Yes.

Q Under what circumstances are they turned away?

A Well, there might be a specific medical problem that is a contra-indication to performing the procedure or perhaps a problem with the patient's anxiety being too great a level to perform the procedure.

Q Are there any medical reasons you know of for denying an abortion to a patient under the age of 18?

A Yes.

[152] Q A medical reason for denying it?

A Are you asking me are there medical reasons for turning a patient away who is under 12 weeks gestation?

Q I left out a clause in my phrasing. Are there any medical reasons for denying abortions to all patients under 18 who can not get parental consent?

A Yes, such as an orthopedic deformity that would not allow the patient to be placed on the gynecological table in the proper position, or severe asthma, severe epilepsy. There are other medical reasons. These are rare.

Q Is it your practice to perform abortions for patients who request them unless there are these contra-indications?

A That is correct.

Q Do you understand this to be consistent with acceptable national standards?

A Yes, I do.

Q Which organizations promulgated those standards?

A The American College of Obstetricians and Gynecologists have promulgated such a position.

Q Is this position consistent with the American Medical Association's standards?

A Yes, it is also consistent with the American Medical Association's standards.

Q Do you understand it to be consistent with the Supreme Court's position?

[153] A Yes, I do.

MR. BEHAR: Objection.

JUDGE ALDRICH: We will take it merely as to his good faith understanding.

Q Does unwanted prengnancy pose any medical problems for minors under age 18?

A I'm sorry. Would you repeat that?

Q Does unwanted pregnancy pose any medical problems for persons under age 18?

MR. BEHAR: Objection.

JUDGE ALDRICH: Does the fact that it is unwanted make it a special medical problem? Is that what you mean?

MR. LUCAS: Perhaps I should eliminate the term "unwanted".

Q Does pregnancy under age 18 pose any special medical problems to those individuals as opposed to older persons?

A Not as opposed to older persons, no.

Q Does going through pregnancy — is that more serious for a person under the age of 18 than it is for a person who older?

A There are sometimes — statistically, there are more complications for a minor to go through a pregnancy, although I would not say these are really significant.

Q Have you ever discussed with minor patients their feelings [154] on the difficulty of obtaining parental consent?

A Yes.

Q What are some of the reasons patients give for being unable to or unwilling to get parental consent?

A The most common reason is fear of parental repercussion.

JUDGE ALDRICH: Parental what?

THE WITNESS: Fear of repercussion that would follow from informing their parents.

Q What are some of the other fears that minors under the age of 18 have in connection with contacting their parents? What types of repercussions?

A Sometimes physical and sometimes fear of literally being not allowed to live in the home any longer, and often simply being afraid to tell their parents.

Q Do you ever encourage minors to discuss their pregnancy with their parents?

A Yes. All patients are encouraged to discuss the abortion decision or pregnancy with anybody whom they wish to confide in.

MR. REYNOLDS: I object to that answer as not being responsive.

JUDGE ALDRICH: Well, it may stand.

Q I think the question is whether you ever refer patients to discuss the problem of pregnancy with their parents.

[155] A My answer would be yes.

Q Are there ever affirmative reasons for the parents' sake why the parents should not be told?

MR. BEHAR: Objection.

JUDGE ALDRICH: What is your objection?

MR. BEHAR: He has just given what the minor has told him. We do not have the parents in this picture at all.

JUDGE ALDRICH: So you object to his qualifications to deduce from his talking with the minors what might be the parental situation at home?

MR. BEHAR: That is right.

JUDGE ALDRICH: All right. Sustained. But if you were going to question the witness' good faith, he may answer that question.

MR. BEHAR: I don't understand. Good faith as to what?

JUDGE ALDRICH: As to his conduct. I believe you do not approve of his conduct. Am I wrong?

MR. BEHAR: I don't approve of the way certain things are done.

JUDGE ALDRICH: I deduced that. If I am wrong, that is that.

MR. BEHAR: No, you are correct.

JUDGE ALDRICH: All right. Then the witness [156] may answer on the issue of good faith.

THE WITNESS: Can the question be repeated?

MR. LUCAS: Would you read the question?

(The question is read.)

THE WITNESS: There are reasons why parents should not be told. You are asking me whether there are reasons for the parents' sake.

Q Do you sometimes discuss with patients the impact of the pregnancy on their parents, if their parents knew about it?

A Yes.

Q Do you encounter instances where there would be an adverse impact on the parents?

A In the opinion of the patient, yes.

Q What are some of the types of situations you have encountered in discussing the impact on the parents?

A That the parents' faith in the patient would be destroyed. It is difficult for me to differentiate between your phrasing "for the parents' sake" and "for the patients' sake". They are often one and the same as presented to me. I don't know if I am answering your question.

Q By witholding consent for the sake of the parents, what I mean is in the interest of protecting the parents from adverse consequences as opposed to the minors' interests. Do the minors ever want to withhold consent out of [157] thoughtfulness towards their parents?

A Yes.

Q Are there instances in dealing with minors where you feel that informing the parents would be disruptive of the family?

A Absolutely.

Q In what way do you think the family would be disrupted in these instances?

A As I mentioned before, there are times when the patient feels she would literally be thrown out of her home or that there are physical threats that she would undergo if her parents knew, and psychological damage to her parents in the patient's opinion.

Q Can you think of any rational reason for requiring the consent of both parents?

MR. REYNOLDS: Objection. It is far too broad.

JUDGE ALDRICH: He may answer.

A No.

Q Can you think of any rational psychological reason for requiring the consent of both parents for all minors under the age of 18?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

A No.

JUDGE ALDRICH: The answer may stand.

[158] Q Do you understand the law that was to go into effect in November would give either parent a veto over whether the minor had an abortion?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: I didn't understand a word of that question.

Q Do you understand that the law that was to go into effect on November 1st as giving either parent an absolute veto over whether the minor obtains an abortion?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Excluded.

Q Is group or individual counseling done at Parents Aid Society?

A Usually group.

Q Are there instances when adults are in the counseling procedure with minors?

A Are you talking about in the procedure or in counseling?

Q In the counseling itself.

A Yes, there are.

Q What is the reason for having both adults and minors together during group couseling?

A I don't see what the reason is for why not.

Q Could you explain what the reasons are for it?

A People are people. I don't see where age enters into this.

[159] Q Are the minors ever embarrassed by being in a counseling session with adults?

A It might occur. It is not common to my knowledge.

Q Can you think of any reason why minors and adults should not be in counseling together?

A No.

Q Have you had complication in treating abortion patients at Parents Aid Society?

A No major complication, no.

Q Have there been any hospitalizations that you know of?

A No.

Q What do you do about the possibility of needing to admit patients for emergency treatment after the procedure?

A If it were necessary, we would simply take the patient to an emergency room of a good hospital, and if it were a bona fide emergency, I am sure they would be admitted.

Q You mentioned that sometimes patients are turned away. At what point in the process of going through the abortion center are the patients turned away?

A It could be at any point. It could be right up to the time I am explaining things to the patient in the treatment room.

Q At what point is the patient finally and irrevocably accepted as a patient you are going to do the abortion on?

A When she is in the treatment room and I feel there [160] is no contra-indication to the procedure.

Q Are the patients finally accepted just on the basis of their original phone call?

A No.

Q Have you ever encountered instances where parents were trying to coerce a minor into having an abortion?

JUDGE ALDRICH: I think this would be a good place to suspend. We will resume the testimony tomorrow morning at 9:30. In the meantime, we will see counsel in the lobby with respect to a motion that has been filed.

(Whereupon the hearing was recessed
to Tuesday, December 31, 1974,
at 9:30 A.M.)

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DECEMBER 31, 1974.

[2] MR. LUCAS: The plaintiffs are prepared to resume with the testimony of Dr. Zupnick.

JUDGE ALDRICH: First off, I will make a short comment. I read the transcript last night. There are a couple of very minor corrections. There may be more, but these are the two that I noted.

On Page 5, line 18, the word "now" should be "not". On Page 52, line 11, it presently reads "rising percentage" followed by a dot and that should read "rising percentage," and then "period" and then a dot.

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GERALD ZUPNICK (Resumed)
DIRECT EXAMINATION BY MR. LUCAS (Continued)

Q For the record, would you state your name again and your association with Parents Aid Society?

A Gerald Zupnick, medical director, Parents Aid Society.

Q Does Parents Aid Society receive patient referrals from other clinics in the city and in the area?

A Yes, to my knowledge.

Q What are the facilities that make such referrals?

A Pre-Term sends us patients and Charles Circle Clinic.

Q Do you know the reason why some of these patients were sent? A What I have been told usually is that these have been minors who do not have parental consent or patients who [3] do not have the usual fee for the procedure.

Q As far as you know, have any other abortion centers or clinics been treating minors without consent prior to the restraining order in this case?

A In the State of Massachusetts?

Q Yes.

A Not as far as I know.

Q Are any other medical procedures performed at Parents Aid Society?

A Yes, the standard gynecological office procedure is performed. There is contraceptive advice. There is the insertion of I.U.D.'s, prescribing oral contraceptives, veneral disease diagnosis, the usual gynecological procedures.

Q Are there any surgical procedures involving cutting done there?

A No.

Q Would you characterize a first trimester aspiration abortion as surgical or medical or does it make any difference?

A It is a matter of semantics. I have heard it called both.

Q Have you had occasion to evaluate the counseling by paramedical personnel in your experience doing abortions?

A Yes.

Q Are you satisfied with the counseling that is done at Parents [4] Aid Society when the patients are presented to you?

A Yes. I think it is excellent in comparison to what I have seen.

Q What have you seen at other facilities?

A I have seen individual and group counseling. I have seen a full range of quality counseling.

Q Have you found any particular credentials were necessary to qualify a person for doing good counseling?

A No. I think good on-the-job training can properly prepare a person for counseling.

Q Why do you not think that particular credentials are important?

A I just don't feel it is necessary for this procedure. I think you could train a person adequately to counsel for an abortion without going through formal university training, which is what I assume you are referring to.

Q Yes. Did you bring with you any of the sample forms for Parents Aid Society?

A No.

Q Who takes the patient's history at Parents Aid Society?

A It can be any one of several people from the receptionist to a nurse to a volunteer who might be there that day, but it is usually trained para-medical personnel.

Q Do you check the patient's history yourself?

A Yes, I do.

[5] Q What do you look for on the history form?

A What I am particularly interested in is any contra-indications in performing the first trimester abortion.

Q How do you determine if the patient is pregnant and how far along she is?

A Well, the pregnancy test on the patient is first done. When the patient comes in to see me, I examine her in the usual bi-manual procedure, which is the accepted procedure for determining size of pregnancy.

Q Have you in your experience ever encountered any minor patients whom you did not think were capable of giving an informed consent?

A No, not incapable of giving informed consent.

Q Do you think that any are screened out before they get to you?

A It is possible. It is hard to know who is screened out before they get to me.

Q Under what circumstances would you think a minor under 18 was not capable of giving informed consent?

A Some form of mental retardation perhaps.

Q Are there many other circumstances that would disqualify them from giving an informed consent?

A For some reason like inability to understand the consent form, but that is very rare. I personally haven't encountered it.

[6] Q What is your understanding of what constitutes an informed consent?

A It is informing the patient of what the procedure is that they are about to go through and its possible complications and ramifications.

Q I believe you testified that there are some patients who do not want to tell their parents, and that is, of course, what this lawsuit is about. What reasons are sufficient to you from a patient for not wanting to advise their parents?

A Any reason. I think any patient is entitled to his or her privacy.

Q Do you cross-examine the patient to try to ascertain the underlying basis for not informing their parents, for not wanting to tell them?

A I wouldn't say that I cross-examine in a courtroom sense, but I will sometimes ask. As I believe I have stated before, we always try to encourage a patient to be as open as possible about the abortion decision with anybody whom they wish to confide in, but it is not forced upon them.

Q Do you also have patients who are over the age of 18 at Parents Aid Society?

A That is correct.

Q Do they ever not want to inform their parents or their children about their going through an abortion?

MR. REYNOLDS: Objection. That is not part [7] of this case.

JUDGE ALDRICH: Excluded.

Q Does Parents Aid Society have any license from the State Department of Health to operate a facility?

A Not to my knowledge.

Q Do you understand that such a license is legally required?

A Not to my knowledge.

Q Do you personally feel that you are complying with the guidelines of the United States Supreme Court decision in operating this facility?

MR. BEHAR: Objection.

MR. LUCAS: This goes to intent.

JUDGE ALDRICH: On the matter of good faith only.

Q You may answer.

A Yes, I believe I am.

Q What type of psychological reactions do the patients have after the procedure?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: What is the objection?

MR. REYNOLDS: I don't know that the doctor is qualified to discuss psychology.

JUDGE ALDRICH: Well, we haven't any evidence to base his opinion on, apart from his qualifications as a medical doctor, so you had better ask some more [8] questions.

Q Can you describe the patient's reactions after the abortion procedure?

MR. REYNOLDS: Objection. We ought to establish if he sees the patient after.

JUDGE ALDRICH: I think so, too.

Q Do you see the patient after the procedure?

A Yes, I do.

Q Are you in the room immediately after the completion of the procedure?

A Yes, I am.

Q To what extent do you see the patient thereafter and before they leave?

A I usually see the patient again in the recovery room on one or two occasions to see how they are doing, and the patients are usually checked by me before they leave to make sure that everything is okay.

Q Do you talk to them immediately after the procedure?

A Yes, I do.

Q Would you describe what their reactions are when you talk to them after the procedure?

A Most often it is relief at the completion of the procedure and surprise as to the simplicity of the procedure.

Q Do you ever encounter reactions of guilt or hostility after the procedure?

[9] A Occasionally, but it is very rare.

Q What percentage of patients does Parent Aid Society follow up as far as you know?

A Well, this a guess. It is about 70 —

MR. REYNOLDS: Objection to the guess.

JUDGE ALDRICH: Sustained.

Q Could you give an approximation from your experience?

A Yes.

Q What would the range be?

A I would say about 75%.

Q What type of follow-up is provided for the patients?

A Well, when a patient is counseled for the procedure they are asked to think about a form of birth control to use. So afterwards, we try to provide that form of birth control to make sure everything is all right post-abortal.

MR. REYNOLDS: I don't think this case is concerned with birth control.

JUDGE ALDRICH: I would be happy to have this stipulated all around.

MR. LUCAS: I would agree with that.

Q May I ask you about the follow-up with regard to possible complications from the abortion procedure. What type of short and long-range follow-up is provided for the patients?

A Well, most complications usually fall into the category of what you are describing as short-range. The patients [10] are checked afterwards simply to make sure everything is medically okay post-abortal.

Q What does a patient do if she has some type of fever or other complication the day after the procedure or two days after the procedure?

A The patient is given an instruction sheet by Parents Aid Society which lets the patient know how to contact us on a 24 hour basis and we are available for any patient on a 24 hour basis.

Q How many days a week do you normally spend in Boston?

A Two.

Q Who handles the patients when you are not here if they need any follow-up?

A Usually Dr. Inker or any one of a number of several cooperating physicians who the clinic feels is good. But I should state that this has been necessary in my experience since we have been in Boston only one time, and it was primarily necessary for reassurance in an anxious patient. Most complications are handled telephonically. It is usually a matter of reassurance of the patient.

Q Have you had any instance of patients being hospitalized after the abortion procedure that you know of?

A None.

Q Do you find it more difficult or easier to perform abortions physically on minor patients under 18?

[11] A Physically?

Q Yes.

A It is.

Q Just in general, not just physically?

A Well, if I were to break it down, I would say that in a younger patient, who is generally nulliparous, who has not been pregnant before, that is, it is slightly more difficult to dilate the cervix. I would say not say significantly so. However, psychologically I would say it is a lot easier usually to perform the procedure because most younger patients do not

perform the procedure because most younger patients do not have the usual stigmata of illegal abortion in thier heads.

MR. BEHAR: Objection.

JUDGE ALDRICH: Overruled.

THE WITNESS: Most younger patients just never had to deal with the problem of obtaining a criminal abortion.

MR. REYNOLDS: I object to that.

JUDGE ALDRICH: I think the original answer answered the question.

MR. LUCAS: We would like to put into evidence a set of standard forms used at the clinic.

(Standard forms used at Parents Aid Society marked Plaintiffs' Exhibit 10 for identification.)

Q Would you state for the record what this set of forms [12] consists of?

A Well, the first sheet here is the confidential information form, which has the patient's name, address and telephone number, which to my understanding are filed separately from the medical part of the chart.

The next page I have is the history and surgical record, on top of which is a very brief history and is essentially the surgical record which I fill out of the procedure.

The next page is the patient's questionnaire, which is essentially the basis of the patient's history.

The following page is the informed consent to the procedure. This is for the patient to read over and to sign authorizing Parents Aid Society to perform the procedure.

The next page is the instruction sheet to which I previously referred that every patient is given.

Q Are all of these forms provided to each patient at Parents Aid Society?

A Yes, to my knowledge they are.

Q Are these the same forms used at Parents Aid Society in New York also?

A Yes.

MR. LUCAS: We would like to move that these be admitted in evidence as the standard forms [13] utilized at Parents Aid Society.

MR. REYNOLDS: No objection.

MR. BEHAR: No objection.

THE CLERK: Plaintiffs' Exhibit 10.

(Plaintiffs' Exhibit 10 for Identification received in evidence.)

MR. LUCAS: We have no further questions of this witness.

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CROSS-EXAMINATION BY MR. BEHAR

Q I believe you stated that you are a contract physician?

A That is correct.

Q Is this an oral contract or a written contract?

A Oral.

Q With whom did you contract?

A Mr. Bill Baird.

Q Did you understand he had authority to enter into this contract?

A Yes, I did.

Q In what capacity did he have this authority as you understood it?

A As clinical director of Parents Aid Society.

Q What are the terms of the oral contract that you have?

A Simply that I am to provide medical services for the Parents Aid Society for which I obtain a fee per patient.

[14] Q Has this fee been set in advance?

A It varies with the patient. It varies with the amount the patient pays.

Q Do you receive a salary from Parents Aid Society?

A No.

Q Could you tell the Court how you are reimbursed?

MR. LUCAS: We object to any extensive inquiry into the administrative and financial aspects of Parents Aid Society because this is the other lawsuit Mr. Behar keeps trying to try here.

JUDGE ALDRICH: We are interested in the doctor's standing. To the extent the inquiry is related to that, it seems to me to be quite relevant. How far he will be allowed to go into it is another question.

Q Would you answer the question?

A Would you repeat the question, please?

Q Would you explain to the Court how you are reimbursed?

A I receive a fee per patient.

Q In the situation of an abortion how is the fee determined?

A It is usually one-third of the fee that the patient pays, but not always because there are some patients who pay a lesser amount and some patients are free, and I don't get anything for these patients.

Q Do you receive fees for anything else besides abortions?

A When I provide other services, such as birth control [15] work.

Q Are those fees a percentage of the patient's charge?

A Yes, they are.

Q Could you indicate what the various charges are for the services of Parents Aid Society?

A Are we going into birth control now?

Q For the various medical services performed there under your directions.

JUDGE ALDRICH: I think we will stick to abortion.

Q Is there a maximum price for an abortion at Parents Aid Society?

A Yes. The abortion fee is on a sliding scale from the patient's ability to pay to a maximum of $150.

Q In the case where $150 is charged, what do you receive in that instance?

A Usually a third.

JUDGE FREEDMAN: Is that paid on a monthly basis?

THE WITNESS: No. It is paid on a daily basis. I am given a check at the end of the day.

Q What was the amount of the last check that you received from Parents Aid Society?

MR. LUCAS: Objection.

JUDGE ALDRICH: Why does it make any [16] difference how many he performs?

MR. BEHAR: I am not asking him how many. I am trying to get an idea of the financial benefits this plaintiff derives.

JUDGE ALDRICH: He told us that. In what way do you embroider what he already said?

MR. BEHAR: It is pertinent to the situation of the minors in this case having similar representation as these plaintiffs. We think there is a conflict of interest type situation that is inherent.

JUDGE ALDRICH: You have established enough of that already without any dollar sign for the argument. You may go ahead.

A I honestly don't recall the exact figure. I believe it was in the area of $600.

Q You have received checks higher than that amount?

A Higher and lower, yes.

Q Does that constitute reimbursement for two days work?

A That is correct.

Q Do you perform —

JUDGE FREEDMAN: Is that for all services or strictly those relating to abortion services?

THE WITNESS: All services. But I should stipulate that I am primarily performing abortion services.

Q As a matter of fact, you do not perform any of the [17] contraceptive services any more, do you?

A On occasion I do. That is not my usual function.

Q That is the rare situation then?

A I wouldn't say rare, but it is not my usual situation.

Q Isn't it a fact that you hired a new physician just to perform the contraceptive services provided at Parents Aid Society?

A That is correct.

Q That was done to free you so you could devote your time to abortions, wasn't it?

A That is primarily correct.

JUDGE FREEDMAN: I would be interested, Doctor, in the number of abortions you performed — the percentage of those that incorporate fees of the maximum $150 as opposed to those that are actually free.

THE WITNESS: As I said before, it is not always free or $150. It is on a sliding scale basis. If you are asking me how many patients pay the total of $150 fee —

JUDGE FREEDMAN: Yes. How many pay no fee on a percentage basis?

THE WITNESS: I would say probably about two-thirds pay the $150 fee and probably about 15% are done for free, and then there is a scale in between on the other patients. I should state that these fees and these determinations are not

made by me. They are made [18] primarily by Parents Aid Society, and I am simply relying upon their integrity in my reimbursement.

Q Are you aware, Doctor, of any legal requirement in the Commonwealth that requires a physician to participate in the fee that is charged a patient for services?

A Not to my knowledge.

Q You indicated that you have encountered situations where there were reasons for not informing parents on the part of minors; is that correct?

A Where minors do not want to inform their parents, yes.

Q You said that in these situations there would be disruption of the family if parents were informed. Is that what you testified to?

A I believe I testified that there could be.

Q This was based solely on the representations to you by the minor; is that correct?

A I have to rely solely upon what any patient tells me.

Q You did not talk with the parents? You did not make any effort to contact the parents?

A No.

Q Your testimony then as to disruption of the family is based solely on the representations of the minors to you?

A The way I accept most patient's histories or questions.

Q And if the minor was not telling the truth, then the reasons for your testimony would not exist; is that right?

[19] A Maybe, maybe not. There might be reasons that are not given. I don't know. The doctor has to accept any patient's history on the basis of what he feels that patient is telling him.

Q Do you always feel that your patients are telling you the truth?

A Not always, no, but essentially my training is to ferret out what I think is the truth.

Q Sometimes do you have the feeling that a patient is telling you what you want to hear?

A No I don't think so. I don't see what the reason for a patient to do that would be.

Q Well, in the referral situation that you mentioned you indicated that one of the reasons for referrals was that it was a parental consent requirement at various other clinics.

A Correct.

Q Wouldn't a reason that might be offered to you by a minor that they know you are going to let them have the abortion without parental consent?

A No question. We do not require parental consent under any circumstances. Why should the patient lie to me?

Q A minor can come in for any reason and not inform the parents?

A That is correct.

Q Have no reason at all, just say, "I want an abortion", and [20] not give a reason?

A You are asking if a patient can request an abortion from me for any reason whatsoever? Is that your question?

Q Yes.

A The answer is yes.

Q You make no effort to follow up on the parents in this situation?

A I do not attempt to call the patient's parents, no, no more that I would attempt to call the parents of a 40 year old patient.

Q Did you continue your formal education beyond 1970?

A Not beyond 1970.

Q Are you certified by any board?

A No, I am not.

Q Are you affiliated with any hospital in Massachusetts?

A No, I am not.

Q What about New York?

A No.

Q No hospital affiliation?

A No.

Q Are you the only medical director Parents Aid Society has ever had in Boston?

A In Boston, yes, to my knowledge.

Q When did you first assume your duties as medical director?

A In October, 1973.

[21] Q Do you hire the counselors or the paramedics at Parents Aid Society?

A No, I don't do any hiring.

Q Do you know who does?

A I am not sure who does the final hiring, no.

Q What are your duties generally as medical director, as you see them?

A To make sure that the medical procedures in the center are done correctly and that patients are being informed correctly and that everything medically is up to par.

Q That is the counseling too?

A Yes.

Q But you don't hire the counselors?

A No, I don't.

Q Do you participate in the decision to hire them?

A I have occasionally been asked for my advice, yes.

Q Who made the decision to utilize the group counseling method?

A I don't know.

Q Did you?

A No.

Q Was this in existence before you got there as medical director?

A Yes.

Q Were abortions being performed at Parents Aid Society before you became medical director?

[22] A To my knowledge, yes.

Q Do you know the doctor or doctors who were doing that?

A I know two of them, yes.

Q Isn't it a fact, Doctor, that the group counseling session is really a convenience to your schedule? Isn't that why it was instituted?

A No.

Q Well, you only spend two days here in Boston; is that right?

A That is correct.

Q If counseling was to be done individually, it would require far more extensive time, wouldn't it?

A More extensive time or more people being involved doing the counseling.

Q So in a sense this group counseling method is ideal for your particular travel schedule, isn't it?

A Not necessarily.

Q Well, as I understand it, you have patients come in in groups, right?

A That is correct.

Q How large are these groups?

A Usually from one to eight patients, but I would say on an average of four to five.

Q They could go higher than eight and as many as ten?

A That would be unusual, but it has occurred, yes.

Q And then immediately following the counseling do the [23] patients then see you?

A Yes.

Q And if the patients have to come in one at a time for a two hour session, it would be very difficult for that all to take place in one day?

A I only see one patient at a time. They could be scheduled in whatever manner. They are available for me to see one at a time. That is all I see.

Q Who made the determination to have the counseling and the operation take place on the same day?

A I don't know. This was already in existence.

Q Did you have any medical reservation about that?

A No.

Q Is there any attempt made to limit the group to, say, solely minors or solely adults?

A Not to my knowledge, no.

Q Do you think it good medical practice to do that?

A To do what?

Q To limit the groups to just minors, on the one hand, and adults, on the other hand.

A Not necessarily, no.

Q The groups that you are talking about range in a variety of ages; is that right?

A Yes.

Q No attempt is made to treat minors uniquely or adults [24] uniquely; is that right?

A Well, are you asking me — would you clarify that question?

Q You do not set up your group counseling sessions to address solely minors, on the one hand, and adults, on the other hand, do you?

A No.

Q Do you discuss with the minor the reasons for refusal to inform their parents of her situation?

A I believe this is taken up with the patient.

Q Do you personally do it?

A Occasionally.

Q Is there any particular reason why you might do it in some instances and not in others?

A No. It is usually my medical judgment.

Q Do you ever tell the minor, "I think it would be a good idea for you to inform your parents"?

A Yes, I have told that to minors.

Q Do you actively encourage parental involvement?

A As I stated before, we encourage any involvement with whom any patient would wish to confide. We feel that support in this kind of decision is beneficial.

Q You do not press it?

A No, it is not pressed.

Q If the patient gives a reason that she doesn't want to in-
[25] form her parents, it is left at that?

A Well, the reason might be gone into, but a patient's right to privacy is respected.

Q This right to privacy, is this a legal opinion you have been given?

A A legal opinion?

Q Yes.

A This is my feeling.

Q It is your own personal feeling?

A That is correct.

Q Well, can you estimate the percentage of patients that are minors who receive abortions at Parents Aid Society? Are you able to do that?

A I would say about 30%.

Q Can you give any estimate to the Court as to how many have not informed their parents?

A It would be guessing at best because I don't know, but I would say half and half.

Q Half and half. Does Parents Aid Society have a reputation as being a place where no questions will be asked about parental involvement?

A Questions are asked.

Q Does Parents Aid Society try to cultivate the reputation that if a minor comes in and does not want to inform her parents she is not going to be given any hassle?

[26] A Yes.

Q You, yourself, do not typically counsel the groups, do you?

A No.

Q This is left up to whom?

A Usually Mr. Baird or Marilyn Morrissey.

Q Did you hire either of those individuals?

A No.

Q Do you have the authority to fire either of those individuals if you were dissatisfied with their work?

A No, I don't.

Q After the counseling sessions are the surgical procedures then performed?

A Yes. Blood work or lab work might be done before or after the counseling, but usually after the counseling procedure is performed.

Q Could you describe to the Court exactly what the procedure is medically for the first trimester abortion?

A Certainly. The patient is already in the room when I come into the treatment room with a nurse. I talk to the patient and go over her medical history with her, and go over the procedure with her, and try to ascertain her anxiety level. If I feel she has to be calmed down, I will attempt to calm her down.

The patient is then placed into the dorsal lithotomy position.

[27] Q Would you tell the Court what that position is?

A The patient's legs are placed onto knee rests where they drape over the patient's legs so the exposure of the vagina can be accomplished. The perineal is prepped with Betadine solution, a surgical soap, and a speculum is inserted into the patient's vagina.

Q What does that look like?

A A speculum is generally described as a duck bill shaped double shoehorn. It is to provide exposure to the vagina. It opens the labia to the vagina. The vagina is then prepped with the same Betadine solution and anesthesia is then injected into the antero lip of the patient's cervix where the tenaculum is going to be placed so the patient doesn't feel the pinch of the tenaculum.

Q That being what?

A That is an instrument to grasp the cervix. The remaining anesthesia is then injected into the patient's cervical and paracervical areas. The patient's uterus is then sounded, which means the depth of the uterus is determined.

The amount of dilation is determined. Dilation is accomplished with Pratt dilators. After the dilation, the vacuum tip is attached to the aspiration machine.

Q What does that look like, this machine?

A It is a stainless steel piece of equipment rectangular [28] in shape and approximately three feet high and two feet wide and a foot and a half in depth with two collection bottles at the top of the machine to accomplish the vacuum aspiration.

The vacuum tip is then inserted into the patient's uterus and the vacuuming is accomplished.

After I feel that the products of conception have been removed, the uterus is curetted to ascertain whether all the tissue has been removed, and if I feel all the tissue has been removed, then I will aspirate for approximately another 15 seconds just to make sure there is no other debris remaining. That is essentially the procedure.

Of course, before each step, the patient is told what is going to happen and what she is going to feel, and whether she is ready for the next step.

Q When the patient walks into the operating room, typically that is the first time she has met you?

A Usually, yes.

JUDGE FREEDMAN: How long does the typical abortion procedure last?

THE WITNESS: The average technical part of the procedure is five to seven minutes.

Q When the patients come in, do they frequently have questions they ask you?

A The patients occasionally have questions, yes.

[29]Q What kind of questions do they ask?

A The most common one is, "How much does this really hurt?" Most commonly the questions pertain to anxiety about the specific procedure.

Q Is this a particularly anxious moment for the patients?

A I would say it is an anxious moment.

Q And it is clearly an anxious moment for them before the counseling, isn't it?

A Yes. I would say before counseling the anxiety level is a lot higher.

Q But there is some that remains in the patients even after the counseling and when they are with you in the operating room?

A Yes, as with any medical procedure.

Q Do you ever have to go over things with the patient that have already been explained to her?

A Occasionally, yes.

Q This is after the counseling session. There are still questions as to what is going to happen to the patient?

A Well, the questions usually are not what is going to happen because this has been explained to them, but usually pertain to the amount of pain involved. This seems to be the patient's most common anxiety.

Q Do you have Exhibit 10 in front of you, Doctor, the forms?

A The forms, yes.

[30] Q With reference to the consent form, did you write it?

A No, I did not.

Q Do you know who did?

A No, I don't.

Q How did it come to be used?

A It was in use when I came to the Parents Aid Society.

Q Did you approve it when you assumed your duties?

A Yes, it seemed in order to me. I am not a lawyer.

Q Did you ask that a lawyer look it over?

A It was my understanding that a lawyer had helped draft this.

Q Is there any reason why Parents Aid Society is not mentioned on this form?

A Not to my knowledge.

Q To your knowledge, there is no reason why?

A Not to my knowledge, no.

Q Do you understand that when you perform a first trimester abortion upon a minor without the parents' consent you are civilly liable to that minor?

A I don't understand what civil liability means.

Q In a tort suit for, say, battery upon the minor, civilly liable to that minor.

MR. LUCAS: I object. There is no basis for drawing that conclusion. It is a legal opinion.

JUDGE ALDRICH: I think the question is [31] reasonable enough. Why not explain it in lay terms?

MR. BEHAR: Well, I will rephrase it.

Q When you perform an abortion upon a minor without parental consent, do you have any understanding as to whether you are subject to a suit by that minor, a lawsuit?

A Anybody could sue me.

Q But for the reason that you are doing the procedure without parental consent. That is what I mean.

A Specifically because I am doing the procedure?

Q Yes.

A No.

Q You do not have that understanding?

A No.

Q Do you have the understanding that the parents of the minor could sue you for the sole reason that you performed the abortion without parental consent?

A I am sure they could sue me.

Q Even if you do the procedure well?

A Sure. They can sue me. Anybody can.

Q You run that risk every time?

A Yes.

Q You deliberately have decided to run that risk?

JUDGE ALDRICH: I don't think, counsel, that you and the witness are meeting on the same track.

MR. BEHAR: I thought we had reached an [32] understanding.

JUDGE ALDRICH: You did and then you got away from it.

Q Do you understand that a parent can sue you civilly merely because you performed an abortion upon their daughter without their consent?

MR. LUCAS: Objection, on just one point. Perhaps the question should distinguish between suing and recovering.

JUDGE ALDRICH: It certainly should. I thought counsel had grasped the point once.

MR. BEHAR: Between suing and recovering?

JUDGE ALDRICH: The witness made it very clear that anybody could sue him for anything. You haven't got him outside of that area.

Q Do you understand that a parent could sue you and recover civil damages, money damages, merely because you

have performed the operation upon their daughter without their consent?

A I don't believe they would recover anything.

Q You don't believe they would recover anything?

A No. I don't think I am doing anything wrong.

Q Has a minor ever given a reason for not informing her parents that you found unacceptable?

JUDGE ALDRICH: What was that question?

[33] Q Has a minor ever given a reason for not informing her parents that you found unacceptable?

A No.

Q If a minor did not want to tell her parents she was pregnant merely because she did not want them to know she had had intercourse, would that be a sufficient reason in your judgment for not informing the parents?

A If she had a specific fear about informing them of intercourse, yes, I would find that adequate.

Q Have you ever refused to perform an abortion upon a minor unless she obtained parental consent?

A No.

JUDGE FREEDMAN: Have you ever refused to perform an abortion for any reason?

THE WITNESS: Yes, often.

Q For medical reasons?

A Usually.

Q Such as what?

A Severe uncontrolled epilepsy, severe uncontrolled asthma, an orthopedic difficulty that would not allow the patient to be placed upon the table, severe anxiety that can not be overcome by our counseling or reassurance.

Q Do you instruct the counselors what to say during the counseling session?

A Well, I occasionally sit in on counseling sessions and [34] do make suggestions. I wouldn't say that I sit down and train the counselors.

Q Who does?

A To my knowledge, Mr. Baird does.

Q It is your view, I take it, that a minor is entitled to an abortion on request for any reason?

A Yes.

Q In your view then, a minor should be free to do with her body anything she wants?

A I didn't say that.

Q Well, would you say that?

A No.

Q Did you say that during the course of the deposition we held in this case?

A I don't believe so. I believe you questioned me as to specific medical procedures that I would think minors would need consent on.

Q Do you remember being asked this question:

"Q Do you think a minor should be free to do with his or her body as he or she wants?"

And the answer you gave was, "Yes".

Do you recall that?

A I assume that if it is in the deposition, I said it.

Q Well, I am reading from it.

A What you are asking me now is whether a minor [35] can do with her body, medically or surgically, what she wants?

Q Would you answer different in this situation?

A Yes.

Q Is there any surgery in your judgment that a minor should not be able to obtain without parental consent?

A Yes.

Q Such as what?

A A craniotomy, a tubal ligation.

Q Is there any reason why these procedures would require parental consent in your judgment?

A The extreme seriousness of the consequences.

Q Is it your testimony that in these situations a minor would not appreciate the consequences?

A Yes.

Q Yet in the abortion situation is it your testimony that a minor would appreciate the consequences of that procedure?

A Yes. I think the consequences are not in the same realm of severity.

Q Have you ever consulted a minor's family doctor regarding the procedures you perform at Parents Aid Society?

A Are you talking about prior to the procedure?

Q At any time.

A Not usually, no.

Q Have you ever found a situation where it would have been [36] desirable to talk to a minor's family doctor?

A Not that I can recall.

Q Did you sign an agreement or enter into any agreement making you medical director?

A Yes. I signed a one statement acceptance of the position.

Q Do you recall what it says basically?

A Basically it says, "I hereby accept the position of medical director of Parents Aid Society."

Q Who asked you to present such an agreement or sign such an agreement?

A Mr. Baird.

Q Did you understand he had authority to make that request of you?

A That was my understanding, yes.

Q In his role as director?

A Yes.

Q Is the surgical equipment used at Parents Aid Society owned by you or by the Society?

A By Parents Aid Society.

Q Do you have any data as to the youngest adolescent that has received an abortion at Parents Aid Society in Boston?

A As I stated during the deposition, I believe, I can specifically recall aborting a 14 year old patient.

Q How many abortions are done in an average week, if it is [37] possible to give an average figure?

A It varies. There is a tremendous variation. In some weeks I have done two abortions and in some weeks I have done 30 abortions.

Q Suppose a patient comes in on Saturday and wants to have an abortion. Will she be given one on that day?

A No. The normal days for performing abortions in Boston are Thursdays and Fridays.

Q She would have to wait five days to get that procedure; is that right?

A Unless she wanted to go to another facility, yes.

Q What is your on-call capability when you are away from Boston relative to situations here?

A It is a 24 hour capability. I am available by a paging device.

Q How does it work?

A Well, our office here can contact our office in New York, who could page me.

Q About how many times a week is that done?

A For patient purposes?

Q Yes.

A In other words, how many times am I paged from Boston?

Q For patient purposes.

A I would say an average of two to three times a week.

[38] Q What sort of situations might occasion these calls?

A Usually a patient's anxiety about the amount of post-abortal bleeding or cramps or low grade fever.

Q Do you know whether these calls relate to minor patients as opposed to adults?

A No, any patient.

Q Minors or adults would be represented in these calls?

A Yes.

Q Do you deliver babies, Doctor?

A No, I do not.

Q Are babies delivered at Parents Aid Society?

A Not to my knowledge.

Q Have you ever delivered a baby in Massachusetts?

A Not in Massachusetts.

Q Is your sole source of income from medical procedures you perform at the Boston and New York Parents Aid Society?

A No.

Q Do you have any other medical source of income?

A I occasionally see other patients, but it is not usual.

Q So a substantial amount of your income is derived from the services you perform at Parents Aid Society?

A The medical part of my income, yes.

Q Have you, yourself, had specific formal training in counseling?

A I went to medical school. That involves quite a bit of training in counseling.

[39] Q Beyond medical school, have you had anything of a formal nature?

A No.

Q Are menstrual abstractions performed at Parents Aid Society?

A Yes.

Q Would you tell the Court what that procedure involves?

A Yes. If a patient has not had a period anywhere up to ten days from the time she should have had her period and has a negative pregnancy test, she can have a menstrual abstraction which is done for the sole purpose of allaying the patient's anxiety about possibly being pregnant, and the menstrual abstraction consists of extensive counseling before the procedure, making the patient aware of the fact that medically the procedure is not necessary, and that it is being done solely to allay her anxiety about possibly being pregnant.

Do you want me to specifically explain what a menstrual abstraction is?

Q No, I don't think that is necessary. But do I understand there has been no determination of pregnancy?

A We perform the pregnancy test.

Q You have to make sure the patient is not pregnant?

A That's right. When I do the procedure, I do it by manual examination to determine the patient's uterine size.

Q Do you perform this proceure upon minors without parental [40] consent?

A If they so desire, yes.

Q And the consequences of unwanted pregnancy do not exist in this situation, do they?

A I am not sure what you are asking.

Q Well, you made a determination that there is no pregnancy before you performed this operation; is that right?

A When the menstrual abstraction is performed, you can not know 100% there is no pregnancy. There could be a very, very early pregnancy in existence.

Q But implantation may not have occurred to trigger the test, is that what you are saying?

A The test is not necessarily triggered by implantation. It is the amount of HCG. in the urine which might not be present at that time.

Q You indicated you see patients in the recovery room; is that right?

A Yes.

Q How long do you spend with the patient in that situation?

A In the recovery room situation?

A In the recovery room situation?

Q Yes.

A It is brief. I just essentially go in to see how the patient is doing.

Q How long does the patient spend in the recovery room?

A On the average of a half hour to an hour.

[41] Q So in a situation where you have, say, 15 surgical procedures to perform, do you, after each one, go into the recovery room? Is that routine practice on your part?

A It is not routine that I am performing 15 procedures.

Q Well, in situations where you have a large number to perform you indicated that there were those occasions?

A Yes. The day is usually broken up. Patients are scheduled in separate groups. I am not constantly going from one procedure room to another procedure room. There are breaks. It is usually groups of five patients.

Q What are the hours that you would see patients in a given day?

A Well, most patients are scheduled to start coming in at noon, sometimes at nine o'clock, but it depends on the patient load.

Q How late do you stay open?

A Usually until nine or ten o'clock at night, but again this varies with the patient load. We have been there much later. We finish up much earlier usually.

Q Have you been there as late as 2:00 A.M.?

A Yes.

Q In situations where minors were being treated at those hours?

A Well, the younger patients we usually try to treat earlier because of problems about returning home.

[42] Q Have you had any personal contact with the Attorney General of the Commonwealth?

A No.

Q Have you had any personal contact of any kind with any of the District Attorneys in the Commonwealth?

A Just with you.

Q I am not a District Attorney.

A Oh, I thought you were.

Q Do you make any attempt to determine that the patient is giving a true name?

A No.

Q Do you think that might be important if you had to have contact with the patient later?

A Well, we don't care about the patient's name. We care about the ability to contact the patient. The patient is told that it is very important where we might be able to contact her.

Q Are you aware that Mary Moe, II could not be contacted relative to a deposition in this case?

A No.

Q Are there any situations where the Parents Aid Society or you or any of the counselors think it advisable to contact the patient post-partally?

A Yes. It happens occasionally. I would say it is rare.

Q For what reason?

[43] A It happens so rarely that I can't really recall any specific reason.

MR. BEHAR: I have no further questions.

JUDGE FREEDMAN: During the course of an abortion procedure, do you do an uterine biopsy to determine malignancy?

THE WITNESS: No.

JUDGE JULIAN: During the aspiration of the embryo —

THE WITNESS: Of the products of conception?

JUDGE JULIAN: You call it the products of conception. Another name for it is embryo, isn't it?

THE WITNESS: Yes.

MR. LUCAS: May I object to any extended inquiry on this? This is far beyond the issues in this case.

[45] JUDGE ALDRICH: He may answer.

Q It is so, isn't it, that the stage of development that you are talking about is properly referred to otherwise than as the products of conception?

A I'm sorry?

JUDGE ALDRICH: I didn't get the question.

Q Is it properly referred to otherwise than as products of conception?

JUDGE ALDRICH: Is what?

MR. REYNOLDS: I was going to state it, Your Honor.

JUDGE ALDRICH: I'm sorry.

Q The tissues which you extract from the mother with the aspirator — in other words, it is called the embryo, isn't it?

A Yes.

Q And properly so?

A Yes.

Q Thank you. You said you recall an instance where you had aborted a 14 year old. Do you recall that?

A Yes, I do.

Q In the deposition you said that you knew she was unmarried or so far as you knew she was unmarried; is that so?

A That is correct.

Q You thought there might have been a case where you had [46] aborted a 13 year old. Isn't that so?

A Yes. As I stated, I didn't recall specifically, but I believe that I did.

Q In either of those cases did you have parental consent to perform the abortion?

A Well, in the instance of the 14 year old the patient's mother was aware and, as a matter of fact, spoke with several people at the center, including Mr. Baird, but no specific writ-

JUDGE JULIAN: Is the embryo attached to the wall of the uterus?

THE WITNESS: That is correct.

JUDGE JULIAN: When it is aspirated, does that mean it is torn away from the wall of the uterus?

THE WITNESS: Yes, you could say that.

JUDGE JULIAN: Is it physically attached by tissue to the wall of the uterus?

THE WITNESS: There is a connection between the products of conception and the uterine wall, a vascular connection.

JUDGE JULIAN: I am talking about the embryo [44] itself. Do you have an aversion to referring to it as the embryo?

THE WITNESS: No.

JUDGE JULIAN: Does bleeding follow?

THE WITNESS: Yes, usually.

JUDGE JULIAN: All right.

THE WITNESS: Excuse me, Your Honor. To further answer your question about malignancy, the products of conception are examined after each pregnancy to determine that there are certain breakdown possibilities in the products of conception that can lead to a malignancy, and these tissues are examined grossly to make sure that malignancy does not exist, but there are not biopsies performed per se.

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CROSS-EXAMINATION BY MR. REYNOLDS

Q Doctor, you used the term in your discussion with the Court and during the deposition and on your direct examination and also on your cross-examination "product of conception". We are all here products of conception, are we not, Doctor?

A Yes.

ten consent was acquired, but I know the patient's mother was aware of the procedure.

Q Do you remember when that was done?

A It was either late 1973 or early 1974.

Q It is the regular practice for the Parents Aid Society to obtain the written consent of a parent if the parent is available to sign?

A No. This is not our usual practice.

Q It is not your usual practice?

A That is correct.

Q Are you familiar with the generally accepted medical practice here in Massachusetts in regard to obtaining consent of at least one parent with regard to surgical procedures performed upon a minor?

MR. LUCAS: Objection. It has not been shown this is a medical practice. It could just as well be a habit or something that is advised by counsel or something [47] for the purpose of ensuring payment.

JUDGE ALDRICH: The question is whether he knows whether there is any practice.

THE WITNESS: No, I am not aware of that practice.

Q You are aware of the fact that some of the patients you abort come to you as a result of being referred to the Parents Aid Society from Pre-Term and Charles Circle; is that correct?

A Yes.

Q Doctor, your attention was called to Exhibit 10 — to one sheet of that exhibit, but there are several pages that make up that exhibit, and I know you have looked at it before. It is correct that on none of those pages is Parents Aid Society, Inc. identified? Isn't that so?

A I believe I looked at the pages during the deposition to examine for that specifically and I think the answer is yes, except by a telephone number on the instruction sheet.

Q Typically, when a patient presents herself to Parents Aid Society and before she goes in to see you, what is done by way of a physical examination, if anything?

A The blood pressure is usually obtained and the temperature, and the patient is usually seen by a nurse to see whether there are any gross abnormalities.

Q You say that the blood pressure is usually obtained, but [48] not in every case?

A I would say routinely.

Q With regard to the patient's questionnaire which you have before you there, there are some questions that relate to physical conditions. You have a question that relates, for example, to diabetes. Is diabetes a factor that you take into consideration when you are deciding whether you should operate on a patient?

A Not unless it is severe diabetes.

Q Have you had any cases of diabetes in young women under the age of 18?

A I have never had to reject a patient because of severe diabetes.

Q But you have had them report to you that they have diabetes?

A Yes.

Q And were any of those young ladies who have diabetes on insulin injections?

A No, none have been.

Q With regard to hay fever, is that a factor that you would consider in your decision to perform the abortion or not?

A Yes, if it were severe or uncontrolled.

Q And you would take their word for that, would you?

A Yes. Well, if I heard a patient wheezing, that would be reason enough to reject the patient.

Q Have you rejected any patients under the age of 18 for [49] reasons of hay fever?

A I have rejected patients for asthma or hay fever, but I don't know the age.

MR. LUCAS: Your Honor, we object to an extended inquiry on this. The Supreme Court decision makes it clear that there are certain matters between physician and patient that are not the subject of inquiry and regulation in the first trimester. We could go on endlessly talking about hay fever.

JUDGE ALDRICH: Do you intend to go on endlessly?

MR. REYNOLDS: No, I do not, Your Honor.

JUDGE ALDRICH: Then go ahead.

Q Is there any procedure for checking the heart rate of a patient when they come in?

A Yes. I failed to say that the pulse is usually obtained.

Q Just the pulse?

A Yes.

Q You do not listen with a stethoscope to the patient's heart?

A Not usually unless the patient indicates any sort of cardiac abnormality.

Q Have you had any heart abnormalities among those young women under the age of 18?

A It is hard for me to answer these questions when you are asking me specifically about under the age of 18. These [50] are not differentiated in my mind when I am doing the history.

Q When patients are presented to you it makes no real difference whether they are under the age of 18 or over 22?

A In terms of the specific examination, yes.

JUDGE FREEDMAN: Have you rejected people because of cardiac abnormalities but you do not know the age?

THE WITNESS: Yes, I have rejected patients because of cardiac abnormalities.

Q What about anemia?

A No, we have never had to reject a patient because of anemia.

Q How about the sickle cell disease?

A No, sir, we have never rejected a patient for sickle cell disease.

Q The patient's questionnaire we are looking at — it indicates that many of these questions are for statistical purposes only. Who gathers those statistics?

A I don't gather them.

Q Do you know whether Parents Aid Society does?

A Not to my knowledge, but I really don't know. Maybe we do.

Q Does it make any difference to you in your decision to [51] perform the abortion how question No. 14 is answered?

A No.

Q There is a factor there, is there not, Doctor, which we discussed in the deposition involving the Rh factor?

A Yes.

Q The Rh factor is a serious factor, isn't it?

A In terms of the possibility of there being an Rh negative patient who is pregnant it becomes serious, yes.

Q From time to time you do, of course, run into all patients who have Rh negative, isn't that so?

A All patients?

Q Some percentage of all patients have Rh negative?

A About 15% of the population.

Q Whether above or below the age of 18?

A Yes.

Q When that becomes a factor, when your patient, regardless of age, has the Rh negative factor, what is the procedure at that point?

A Well, for one thing, we do an Rh negative determination on the patient's blood. If the patient's blood is indeed

found to be Rh negative, a further factor is determined, the Du factor. If the Du factor is negative, the patient's blood is cross-matched to the Rh immune serum, the purpose of which is to prevent problems with future pregnancies because of the Rh incompatibility. It stops [52] the patients from developing certain antibodies that can cause in lay terms blue babies.

Q Spontaneous abortion?

A Yes, it could.

Q In other words, unless the serum is given there is a real probability of future adverse consequences?

A No, I wouldn't say that.

Q You wouldn't go that far?

A No. Very often — well, I shouldn't say very often — but often the Rh factor is not a problem, especially in the first pregnancy, but is a potential danger and should be dealt with.

Q And that is dealt with at some extra charge?

A Yes. The Parents Aid Society charges $25, which is their cost, or a dollar below cost for the serum, for an injection of the serum.

Q Doctor, are you aware generally that there has been a change in the law since January 1, 1974 with respect to the age of majority here in Massachusetts?

A No.

Q Are you award of no distinction between that which existed before January 1, 1974 and prior to it?

A No, I am not familiar with that part of the law.

Q Are you aware or do you have general knowledge of any crime referred to as statutory rape?

[53] A I think statutory rape is rape on a minor. I am not a lawyer. I don't know what the term really means.

Q That exhausts your information on that?

A Yes.

Q As I understand it, your general work week is a four day work week; is that correct?

A In terms of Parents Aid Society.

Q You work two days in New York and two days here in Boston?

A That is correct.

A When your deposition was taken on December 5th, in answer to a question as to the last record you had of the number of abortions you had performed for your last stint in Boston, I believe you answered that you had been the recipient of a check for $900.

A I believe that is correct.

Q That was for two days work?

A That is correct.

Q Do you have a personal view as to whether or not a minor patient makes a decision to carry or not to carry during a pregnancy?

A Whether a minor patient elects to abort or carry through pregnancy, do you mean?

Q Yes.

A I think that is the patient's decision.

[54] Q It makes no difference to you one way or the other?

A No.

Q So far as you know, the Parents Aid Society has no facilities for those young ladies that might elect to carry full term?

A For prenatal care?

Q For any young lady that cares to carry her baby.

A I believe they usually are referred to an obstetrician.

Q From your general knowledge, Doctor, are you familiar with the adage, "Despite his good intentions, he that deals with a minor does so at his peril"?

A I have never heard that adage.

Q You have never heard that?

A No.

Q Are you familiar with the advertising campaign that is conducted by Parents Aid Society?

A Not an advertising campaign. I know there are ads in newspapers.

Q Are you consulted about the composition of those ads that are placed in the newspapers?

A Well, I believe it is just one ad. I have seen it.

MR. LUCAS: Objection. This inquiry is getting far beyond the issues in the case and even further beyond the interests of the intervenors.

JUDGE JULIAN: I understand the law of [55] Massachusetts prohibits or at least medical ethics prohibit a doctor from advertising. I suppose the purport of the question is whether or not this doctor is doing it indirectly.

MR. LUCAS: There is a case before the Supreme Court —

JUDGE JULIAN: I am not concerned with that. There is no decision of the Supreme Court on the matter.

MR. LUCAS: We submit he has not laid a proper foundation to show anything illegal or unethical about advertising, much less that it is relevant to the case.

Q I ask you, Doctor, if that is the ad with which you are familiar?

A Yes, that is the ad.

Q That is the ad that appears regularly in a newspaper here in Boston?

A I can't testify as to the regularity of it, but it is an ad I have seen placed in newspapers in Boston, yes.

MR. REYNOLDS: I would like to submit this in, Your Honor.

MR. LUCAS: We object to the receipt of this.

JUDGE ALDRICH: We will take it. Whether it is relevant or not, we will decide later.

THE CLERK: Defendants' Exhibit A.

(Ad marked Defendants' Exhibit A.)

MR. LUCAS: Could I see the full paper to see [56] if there are any other advertisements of a similar nature?

JUDGE ALDRICH: Yes.

Q I believe, Doctor, on your cross-examination by Mr. Behar, in describing the procedure by which the party is aborted, you said that there is a gentle curettage.

A Yes.

Q Is that a cutting?

A No, it is not.

Q Is it a scraping?

A It is a scraping, that's correct?

Q What do you scrape?

A The uterine wall.

Q Do you apply a tool to do that?

A Yes, a uterine curette.

Q What is its size and general character?

A It is about 15 inches long and it has a bulbous stainless steel handle. It has a think shaft of stainless steel and a loop end with a sharp edge for scraping the wall.

Q Is the usual thing in that situation to have bleeding, isn't that so?

A Yes, that's correct.

Q As a matter of fact, bleeding after an abortion lasts for some four to ten days or so, isn't that right?

A It is possible. The most common situation is two to [57] three days. I might add for your edification that it can last longer than ten days, but that is not the common situation.

JUDGE FREEDMAN: Do you mean a flow or a stain?

THE WITNESS: Usually just a stain. For the first two or three days there is usually a flow of two ounces a day, but usually beyond that there is perhaps what you would describe as a stain.

JUDGE FREEDMAN: Have you ever had a case where there was an abnormal amount of flow and a transfusion was necessary for the patient?

THE WITNESS: Not that ever required a transfusion or any intravenous fluids, no.

Q It is not uncommon at Parents Aid Society to have several girls at one time giving pseudonyms for their names, isn't that so?

A It is possible. I am not knowledgeable as to that.

Q Do you make a check of the patient's name?

A No. Me, personally? No.

Q Yesterday you said that you were concerned about the potential enforcement of the statute, and I gather it is your intention to be law abiding, isn't it, Doctor?

A Yes, it is.

Q And if the statute in question is upheld, you will obey the [58] law, will you not?

A Yes, I will.

Q Doctor, it is my understanding from your deposition that as a general rule the patient who has been aborted leaves your premises about a half hour after the procedure is performed.

A A half hour to an hour on the average, I would say, yes.

Q What is the total length of time in the general run of things a patient is on the premises?

A Usually four to six hours.

Q With regard to the arrangements — you testified that you are a contract physician.

A That is correct.

Q As I recall it, at the deposition you said there was an annual accounting between you and Parents Aid Society with respect to the expenditure for nurses and the operating room.

A For the nurses on the days I am treating patients, yes.

MR. LUCAS: Objection. We are going far beyond the interests of the intervenors.

JUDGE ALDRICH: It seems to be starting out that way.

MR. REYNOLDS: I will end quickly, Your [59] Honor. This is on the issue of whether or not he is in fact an independent contractor as opposed to an employee.

JUDGE ALDRICH: Go ahead.

Q And you reimburse them 50% of that amount, is that so?

JUDGE ALDRICH: What amount?

MR. REYNOLDS: Of the total amount that has been expended for nurses through the year who have been present while he is operating.

A The cost of the nurses hired for the days when I am operating is split between me and Parents Aid Society.

Q And bring no tools to Parents Aid Society, do you?

A No medical tools, no.

Q With regard to where your facility is located, it is just off Copley Square, on Bolyston Street, isn't it?

A That is correct, 673 Boylston Street.

Q It is just across the street from the new addition of the Public Library?

A That is correct.

Q Thank you, Doctor.

A You are welcome.

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[60] RE-DIRECT EXAMINATION BY MR. LUCAS

Q Dr. Zupnick, are you familiar with the adage that the Bill of Rights is not for adults only?

A I am not familiar with it really.

Q Referring to the exhibit I have handed you, would you look at Page 23 and tell the Court whether you see any advertisement there for any abortion facility?

A Yes, there is one for the Crittendon Clinic.

Q Would you look at Page 28?

A Yes.

Q Do you see one?

A Yes, there is one for Pre-Term.

Q Would you look at Page 39?

A There is an advertisement there for New England Women's Services.

Q Do you think these ads are useful for informing patients of the availability of abortion services in the Commonwealth?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Sustained.

Q Are you familiar with the medical and organizational practices at abortion facilities other than the two you have worked in to some degree?

A To some degree, yes.

Q In your experience is the method of payment at Parents Aid [61] Society common to these other facilities — the method of determining fees, I should say, of the physicians?

A I assume so, yes. To my knowledge it is common.

Q In your experience as a physician, is it regarded as proper and ethical?

A Yes.

Q Do you know of any case where it has ever been challenged as not being proper and ethical?

A No.

Q Do you know the number of abortions that are done in free-standing facilities in the United States each year, approximately?

A I can't give you that number.

Q Do you know whether or not menstrual extractions are widely done in the United States?

A They are done in the United States, but I would say not as commonly as abortions. It would be a much smaller number.

Q Do you know whether or not the United States Government has financed menstrual extraction programs throughout the world?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: I must say I am sorry we got into this at all. I haven't seen the relevancy. I can't [62] blame you for asking questions since the defendants opened it up.

MR. LUCAS: That is the last question.

JUDGE ALDRICH: Go ahead.

Q Are you familiar with United States Governments abroad?

A No, I am not.

Q Do you find that the questions minors ask any different from the questions adults ask at Parents Aid Society?

A As a general range of questions, no.

Q Do you regard Mr. Baird as an expert counselor?

A Yes.

Q Do you regard him as qualified to train other counselors?

A Yes.

MR. BEHAR: Objection.

JUDGE ALDRICH: He may have it.

MR. LUCAS: No further questions. Thank you.

THE WITNESS: You are welcome.

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RE-CROSS EXAMINATION BY MR. BEHAR

Q If parents are involved and do come into Parents Aid Society with their minor daughter, do they sign anything?

A I don't believe so, no.

Q So even with the parents you have no knowledge of parents signing anything?

[63] A No, I don't believe so.

Q Do you receive a fee if no abortion is performed on a particular patient?

A No.

Q The other forms —

A Let me qualify that last answer. If I examine a patient and she is found to be over 12 weeks gestation, a ten dollar fee is charged for that examination, assuming the patient is not being done for free, and I share in the ten dollar fee.

Q The other forms besides the consent form, did you write those forms?

A No, I didn't write any of these forms.

Q Do you know who did?

A No.

Q They were just there when you showed up?

A Yes.

Q Do you have any personal recollection of any of the Mary Moes in this case?

A No, I don't.

Q You indicated yesterday that you didn't think there was any rational medical or psychological reason for requiring the consent of both parents in this situation; is that right?

A Yes.

Q In your judgment — [64]

JUDGE ALDRICH: Is this re-cross examination?

MR. BEHAR: I would ask the Court's indulgence for two questions.

JUDGE ALDRICH: All right.

Q Is there any rational medical or psychological reason for requiring the consent of one parent in your judgment?

A No.

Q Emotional support is not a rational reason in your judgment then?

A I didn't say emotional support. You asked me about consent. Emotional support is always important. You asked me about consent.

Q You don't think that parental involvement, which is attached to consent, can provide that emotional support?

A It can, but you don't have to have consent to have that emotional support from a parent.

MR. BEHAR: I have no further questions.

JUDGE ALDRICH: Mr. Reynolds, do you have anything further?

MR. REYNOLDS: No, thank you, Your Honor.

JUDGE ALDRICH: Mr. Lucas, would you be willing to state for the record, because there was no reporter present yesterday afternoon, what you are prepared to stipulate?

MR. LUCAS: We are willing to stipulate that [65] we are challenging the statute only on its face as opposed to as applied.

JUDGE ALDRICH: Under those circumstances, I would like to inquire of the defendants whether there is any need of taking the testimony of Mary Moe, I?

MR. BEHAR: May we have a moment?

JUDGE ALDRICH: Surely.

MR. BEHAR: I would ask the Court whether a recess could be taken at this point.

JUDGE ALDRICH: Yes.

MR. BEHAR: Thank you.

(Recess)

MR. BEHAR: Your Honor, we are not agreeable to the suggestion.

JUDGE ALDRICH: Under those circumstances, would it be appropriate to take the testimony in camera at two o'clock?

MR. BEHAR: Yes, Your Honor.

MR. LUCAS: Yes, Your Honor, it would be. We do suggest it would be proper for the Court, in light of the fact one of the plaintiffs has testified on the standing issue and the law is being challenged on its face, not to require any further testimony.

JUDGE ALDRICH: I would hope counsel would see it that way, but we can not insist on it.

[66] MR. RILEY: We made a request, Your Honor, for the identity of Mary Moe, I and Mary Moe, III for the purpose of cross-examination if she takes the stand. We would ask the Court for an order compelling the plaintiffs here to reveal the identity of Mary Moe, I and Mary Moe, III.

JUDGE ALDRICH: We will face that at two o'clock.

MR. LUCAS: We do have Mr. Baird available to testify.

JUDGE ALDRICH: We will take Mr. Baird until one o'clock.

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WILLIAM BAIRD (SWORN)
DIRECT EXAMINATION BY MR. LUCAS

Q Would you state your name and age?
A William Baird, 42.
Q Are you a plaintiff in this lawsuit?
A Yes, I am.

Q What is your current occupation, Mr. Baird?

A I am currently a lecturer traveling across the United States and I am also director of Parents Aid Society.

Q Do you receive a salary from the Parents Aid Society?

A I have not received a salary in eleven years.

Q Do you receive income from lectures?

[67] A I receive income from lectures and writing.

JUDGE ALDRICH: I am having difficulty hearing you.

THE WITNESS: I beg your pardon. My income is essentially through lecturing and occasionally I write.

Q Do you have any college degrees?

A I have a bachelor of science degree.

Q Did you study psychology during the course of that curriculum?

A Yes, I did.

Q Will you describe what your employment has been thereafter?

A I think for approximately five years I was employed for an internationally known drug company by the name of Sandoz, which deals with drugs for psychological disturbances. Part of that responsibility was dealing with psychiatrists, explaining how the particular psychiatric drugs did work.

Then I was two years in the Service, and for approximately two years I was clinical director for a nationally known birth control manufacturer called Emko.

Q About how many colleges have you lectured at in the course of your lecturing career?

A Colleges and high schools, I would estimate probably over a thousand, in every state of the nation, including Alaska.

Q Would you identify some of the major institutions you have [68] lectured at?

MR. REYNOLDS: I object.

MR. LUCAS: It goes to his qualifications.

MR. REYNOLDS: I don't see how it is relevant to the case.

JUDGE ALDRICH: He may answer.

A I have lectured at such universities as Harvard University, M.I.T., the University of Southern California. I was a guest of honor with United States Supreme Court Justice Douglas at the University of Hawaii. I have lectured at many law schools, such as Boston University Law School.

I have also had many guest appearances on national and international television.

JUDGE JULIAN: Were you guest of honor of the university or some segment of the student body?

THE WITNESS: To the best of my recollection, Your Honor, I was a guest of the student body or I was called Distinguished Lecturer, which comes under the direction of the President of the university, and particularly in the case of the University of Hawaii, when I was with United States Supreme Court Justice Douglas, we were guests of the administration as well as guests of the student body.

Q What has been the subject matter of your lectures?

[69] A The subject matter essentially dealt with abortion, the birth control issue, the rights of people to determine their own freedom in this particular area.

Q In your travels to different universities have you ever encountered any university programs in abortion counseling?

A As a specific program, no.

Q Approximately how many years have you been involved in abortion counseling?

A Approximately eleven years. Could I add to my previous answer to your question that where no formal training programs were set up on counseling for abortion at universities, I have been asked to teach recently at Boston University, a few months ago, and the counseling group is called Eros, and I set up a training program there.

I have also set up training programs for teaching counselors at government funded hot lines.

Q How did you obtain your expertise in counseling in the abortion field?

A After eleven years, having set up the nation's first abortion group in New York, sort of on-the-job training to meet the needs of the community as I had seen it and through eleven years of experience evolved what is very much a similar pattern in many other places today.

Q Have you endeavored to keep up with any of the scientific literature in the medical and psychological fields during [70] this time?

A Since I debate nationally these issues, particularly with some of the people in this room, and some of the nationally known figures on the opposite side of the coin, I must keep up with the literature and I do read much of the legal literature as well as much of the medical literature.

Q In addition to speaking in colleges and universities, have you ever spoken to conventions, health conventions, anything of that nature?

A Yes, I have. I was the featured speaker this past year for the State of Wisconsin at the National Welfare Association convention. I was their keynote speaker. I might point out that this past year I was the graduation speaker to 5,000 engineers at Lowell Technical Institute at their request.

Q Could you describe the work you have done in training abortion counselors or birth control counselors?

A Essentially, the work was to set up a program to get them familiar with the types of problems they might encounter, how to handle these particular types of problems, breaking it down into reproductive physiology, expaining the techniques of birth control and also trying to get them into what we call role playing.

Q Since when have you been doing any abortion counseling in the Commonwealth of Massachusetts?

[71] A Officially since Parents Aid Society was formed a year ago — since I was arrested in 1967 when I challenged the birth control law. Almost every day since I have been in Massachusetts somebody has asked for my advice on the abortion issue and birth control issue.

Q When the parental consent law was getting ready to go into effect, did you have any fear you would be prosecuted by the District Attorney?

A I feared I would be prosecuted, yes.

Q Did you have any contact with the District Attorney concerning the possibility of prosecution?

A I had no contact with him.

Q Did you have any contact with him before you were arrested the last time on the birth control law?

MR. BEHAR: Objection.

A I had no contact with him at all. I might point out that my fear was realized in the State of New York when I was jailed for corrupting the morals of a minor for showing a diaphragm publicly.

MR. BEHAR: Objection.

JUDGE ALDRICH: That may go out.

Q Did you have fear of any action being taken by the Attorney General's office against you pursuant to the parental consent law?

A Very much so. That was based on the fact, I [72] believe, Judge Julian and others rendered a decision that birth control would be legal and the Attorney General said he would still enforce the old law.

MR. BEHAR: Objection. I move that go out.

JUDGE JULIAN: The Supreme Court of Massachusetts affirmed your conviction in the Superior Court. You came before me on a petition for writ of habeas corpus and I did not grant the writ.

THE WITNESS: You didn't.

JUDGE JULIAN: It was not in my court that you were convicted.

THE WITNESS: That's right. You didn't grant the writ. I believe the other judges saw fit to grant it.

JUDGE JULIAN: The Court of Appeals did issue the writ. You were not convicted as a result of a trial before me.

THE WITNESS: No, not before you.

Q Did the impending November 1st effective date of the parental consent law have any effect on the activities of Parents Aid Society?

A Very much so. We had to try to see if we could aid as many of the young people who were calling us before the new law would have gone into effect, which was November 1st.

[73] Q Did you institute this action in lieu of breaking the law with this lawsuit?

A I learned from my experience in this state that it would probably be a wiser move. That is why we filed the suit the day before the new law was to go into effect. I was hoping somebody else might do it though.

Q Would you describe for the Court the counseling process at Parents Aid Society and preliminarily who does the counseling at Parents Aid Society?

A It is done generally by myself or a very fine nurse, Marilyn Morrissey who was president of her class at Boston University School of Nursing.

Q Would you briefly outline precisely what subjects are covered in counseling?

A Essentially the first thing we do is go into the reproductive physiology so that the people may understand how their body works. We explain something about the uterus and how conception actually takes place.

JUDGE ALDRICH: Just a moment.

MR. LUCAS: We have no objection to his presence.

JUDGE ALDRICH: The Court objects to the placard.

MR. LUCAS: May we now proceed?

JUDGE ALDRICH: I don't know. I am going [74] to see what happens.

You may proceed.

Q Would you proceed with your description of the counseling process at Parents Aid Society?

A We explain the basic human physiology, the reproductive physiology that is involved. In the second stage we explain the technique itself. During the explanation we use a plastic model of the uterus as we point out what a dilator looks like and explain how it is inserted, and we explain what a curette looks like and show them the actual devices.

We also point out the analgesic that is used, the local drug. Then after that is done, we ask them if they have any particular questions on that and on occasion people will ask questions.

The next stage we go into is what to expect after. We also, by the way, explain what happens during the procedure and after the procedure, such as what medications to take, to check the temperature every day for a week or so, and we go into a long list of things, which the judges have before them, the instruction sheet. They may ask questions about that.

Then we go into the arena of birth control. We spend a great deal of energy and effort explaining each technique with perhaps the suggestion that, if it is possible, they take some technique home with them that particular day. [75] Usually most people decide on the pill or the I.U.D.

Then when it comes up and when it is appropriate, when people will say that they feel guilty, we try to talk to them about many of the social pressures that are imposed upon them by a very sexist society.

We do point out some of the problems with relationship to a male dominated medical profession, the male dominated courts and the male dominated religious pressures that exist.

MR. REYNOLDS: If Your Honor please, I object to this. It seems to me there are an awful lot of conclusions here that are not particularly helpful to anything we are discussing.

JUDGE ALDRICH: I can see that this can balloon up. Your original suggestion that we keep away from birth control seemed to me to be admirably taken. The plaintiffs do not seem to be respecting it.

MR. LUCAS: I will ask a more specific question about the abortion counseling.

Q Do you describe the possible complications from the abortion procedure?

A Yes. We explain the possible complications ranging from fever and cramping to bleeding, each one of these as a possibility.

Q Do you discuss the alternative or alternatives to having an [76] abortion?

A Yes. That comes up earlier. I might point out with due respect to all the testimony I heard yesterday that my testimony is directly contrary to that. 99% of the people who come to me have clearly made up their mind that this is what they want done.

Q To what extent do you reopen and discuss that conclusion?

A To the degree that we ask people, "Have they thought this through? Is this what they want to do? Have they considered all the alternatives?"

Most of them just look at me and laugh and say, "Yes".

Q Do you regard it as demeaning to the minors to try to continuously reopen the question?

MR. REYNOLDS: I object to the question.

JUDGE ALDRICH: Excluded.

Q Do you feel that minors have the capacity to have made up their mind before they come?

A The minors feel very strongly about that, including the minors that were here yesterday in the courtroom, which is why they walked out today.

JUDGE ALDRICH: That is not a responsive answer. That answer may go out.

Q To what extent have the minors generally speaking evaluated the options of continuing pregnancy or having an abortion [77] before they come to Parents Aid Society?

A They have told me they have weighed the possibility of being forced out of school. They have weighed the possibility of, using their terms, a shotgun wedding. They weigh the possibility of their family beating them up. They have weighed the possibility of the family forcing them to go into a home for unwed mothers. They have concluded that they are quite intelligent and able to decide their own future and their own destiny, and they have concluded that abortion is the wisest decision for them.

Q Do they ever come impulsively rushing into the center after learning they are pregnant?

MR. REYNOLDS: I object.

JUDGE ALDRICH: I'm sorry. I wasn't paying too much attention. It is leading.

MR. LUCAS: I apologize.

Q When they come to the clinic, do they come in a rushed or an unrushed manner?

MR. REYNOLDS: I object to this.

JUDGE ALDRICH: That is leading.

THE WITNESS: I'm sorry. I did not hear your answer, Your Honor.

JUDGE ALDRICH: It is leading, and I don't think much of the question anyway.

Q What is their state of mind when they first contact the [78] clinic?

JUDGE ALDRICH: How do they exhibit their state of mind? He doesn't know what it is. He may testify as to the external manifestations as he knows them.

MR. LUCAS: I will adopt that question.

THE WITNESS: That was a good question. I would say that many of the young people are apprehensive, very tense, very worried, based on the concern: will their privacy be violated?

MR. REYNOLDS: I object.

THE WITNESS: They make it a very clear point stating, "Please, please, don't let my parents know", and then they tell me all the things that will happen, and even after I have assured them I sometimes wind up having to reassure them because of the tremendous fear they have of parental involvement.

I might point out that not only do minors feel this way, but a lot of times adult people will feel this way, fearing that their husband might find out.

Q You have been in the courtroom during the entire proceedings today, have you not?

A I thought the trial started at 10:00, so I missed the first 20 minutes.

Q But you were here for the most part today?

A Yes.

[79] Q Has your experience with minors differed in any respect from the other witnesses that have testified today?

A Very much so.

Q Would you describe the specific differences?

A May I point out why the differences? I see people —

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Sustained.

Q Would you describe the differences that you have observed, and if you have observed any rationale behind them that was observable, please so state.

A As I understood much of the testimony yesterday, it was stated that they thought at least one parent ought to know or it might be good for the parents to know. Many of the young people I have talked to have clearly said that they feel it would be bad for the parents to know, that it would disrupt their family life. A lot of times they felt it would create problems that neither the parents could handle nor they could handle.

A dimension that no one touched upon was the fact that the siblings within the family is a very real factor. That some youngsters are being blackmailed by other members.

This testimony given to me by young people through the years, that they are being blackmailed by many younger [80] people of their families saying, "If you don't do the dishes" or "if you don't do my homework", or certain things, "I'll tell Mom that you had an abortion". So a lot of these kids are extremely apprehensive and very tense in contrast to much of what I heard yesterday.

Q Would you describe some of the parental reactions to the minors' pregnancies as described to you by the minors you have come in contact with?

A Is this before or after the abortion?

Q Before and then after.

A Before an abortion, I have had youngsters come to me and tell me that a neighbor —

MR. REYNOLDS: I object. This is hearsay on hearsay.

THE WITNESS: How do I establish what they said?

JUDGE ALDRICH: How does this differ from anything else we have been told?

MR. REYNOLDS: It seems to me this goes far afield, what he has heard about what somebody else told the children and their relating it back to him. It seems to me this is not particularly probative of anything.

JUDGE ALDRICH: It could be found to be probative of the state of mind of the child. Whether state of mind is important or not is another matter.

[81] THE WITNESS: Many of the young people come to me and are particularly apprehensive about what their parents will do. We do know of cases where parents have literally beaten children. I have seen children come in with black eyes. We talk about the battered child syndrome. That can be extended to the battered teenage syndrome.

I could also point out where the father has beaten up the boyfriend of the girlfriend and thrown the young woman out of the home.

I might also point out that after the procedure was done and the parents somehow might find out, I have had parents come down to my abortion center and have threatened me physically to beat me up. I can give you a specific case that just happened recently where —

JUDGE ALDRICH: No.

THE WITNESS: Well, this specific case —

JUDGE ALDRICH: No.

THE WITNESS: Okay.

Q In your dealing with minors under 18 do you find they are able to understand the counseling procedure?

A I find the youngsters can understand the counseling procedure and are quite bright and sophisticated in a lot of ways.

Q Do you find they are lacking in knowledge about reproduction, [82] however?

A I don't find them lacking in knowledge about reproduction as much as I find sometimes their inability to be able to have ready access to birth control, but in contrast —

MR. REYNOLDS: I object to that.

JUDGE ALDRICH: That is irrelevant at the moment.

Q Do you find they are able to understand the nature of the abortion procedure and its complications?

MR. REYNOLDS: I object to my brother continually leading this witness. There are other ways to ask the questions and get the witness' own testimony.

Q Are the patients, in your experience, able to understand, for example, the possibility of complications?

A I think they can understand the possibilities of complications and understand the procedure and sometimes more so than older people.

Q In your deposition you made a statement concerning the fact some minors had difficulty reading a thermometer. Would you explain what you meant by that statement?

A What I meant, Mr. Lucas, was that some people who have not been explained how to hold a thermometer, that you have to tilt it to be able to read where the mercury level is — not the comprehension part, but the mechanical part of knowing how to manipulate it. That is all I meant [83] by that remark.

Q At Parents Aid Society who ultimately makes up the patient's mind or does the patient make up her own mind whether to go through the procedure?

A The patients very clearly make up their own minds. As I mentioned earlier, by the time they come to me their mind has been pretty well made up.

Q At what stage is it determined at the Parents Aid Society she will be accepted as a patient and aborted?

A The final stage is over and she is in the hands of the medical director, Dr. Zupnick.

Q Is any determination ever made on the basis of the original phone call of the patient?

A The original phone call of the patient, since I handle literally thousands, is no proof the patient is even pregnant. A lot of times a person will miss her period for reasons other than being pregnant. A lot of times people think that if they haven't missed their period, they are pregnant. There is much misconception.

Q Would you describe the reactions of patients after having the abortion?

A I can tell you since I am in the recovery area sometimes talking with them that there is tremendous relief, tremendous joy, and they are happy — to use their words — that they have another chance at life, another [84] chance to finish school, another chance to do something for themselves.

Q Do you ever observe reactions of guilt?

A Yes, on occasion there have been some.

Q Is further counseling provided such patients?

A Yes. There is group counseling as well as individual counseling. On occasion, an individual counselor will come forward on this particular issue.

Q Would you describe the interaction between adult and minor patients in instances of group counseling where both are included?

A They are very much supportive of each other. I think people who are in this particular situation have learned to recognize and respect each other's total human being. It is not based on discrimination of age.

Q Do you feel minors are able to accurately assess their parents' reactions to their being pregnant?

A I feel that from what youngsters have told me —

MR. BEHAR: Objection.

JUDGE ALDRICH: He may answer.

THE WITNESS: They have said they have known of a sister in their family who was pregnant and told how she was discarded from the household. I believe one of the Mary

Moes herself told me that at the age of 17 she would be thrown out of the household. A lot of [85] times they will talk about next-door neighbor's children who have gotten pregnant and their father or mother would say, "If that was my kid, I would throw her out of the house." So often enough they come in with these concrete viewpoints.

Q Do you regard any reason as a valid reason for a patient who is pregnant having an abortion?

A The most valid reason is what the woman herself feels and nobody else.

Q Do you regard any reason as a valid reason for not informing the patients?

A Any reason that that person feels is correct, no more than a married woman would not be forced to inform her husband.

Q Do your views on abortion affect your testimony in this case at all?

A I don't think anyone has ever known —

MR. REYNOLDS: I object.

JUDGE JULIAN: What was the question?

MR. LUCAS: Whether or not his views on abortion affected his testimony.

JUDGE ALDRICH: I think a similar question might be asked on cross-examination.

MR. BEHAR: May we establish, first, what his views are on abortion?

[86] JUDGE ALDRICH: You objected to the question. I sustained it. I said it was proper for cross-examination.

Q Where do the patients of Parents Aid Society usually come from in terms of referral?

A The patients come generally from other clinics, such as Pre-Term, Planned Parenthood, as well as people who see me on television or when I walk down the street people stop me

who recognize me and come over to me and speak to me. This occurred in the courtroom yesterday.

Q Do you understand that Parents Aid Society has a right to advertise in newspapers, such as the exhibit that was put in earlier?

A I understand they have that right the same as the United States Government advertises overseas.

Q Are you aware of any court decision by this court sanctioning that right?

A Yes. I believe the case of Pre-Term allowed advertising in subway cars.

Q Do you recall who the judge was in that case?

A I believe it might have been this court. I am not sure.

MR. LUCAS: I have no further questions of this witness. Just as an informational matter, that decision was by Judge Murray.

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[87] CROSS-EXAMINATION BY MR. BEHAR

Q Would you please state your address for the Court? I don't believe you gave that.

A 1269 G Street, Valley Stream, New York.

Q Do you maintain a residence in this state?

A I beg your pardon?

Q Do you maintain a residence in this state?

A Yes, I do.

Q Would you state where?

A I would like to ask the Court. I would not want to do that. I have had many death threats aimed at my wife and children. I have gone through great pains to keep them in seclusion.

MR. BEHAR: I won't press it.

Q What is your position at Parents Aid Society?

A I am its director and founder.

A Who hired you?

A Like I said, I am its director and founder.

Q You were the founder?

A Right.

Q Well, it is a corporate entity, is it not?

A But it's my baby; it's my dream.

Q You are really Parents Aid Society?

A Along with other people who share my philosophy.

MR. LUCAS: I object. It looks as if we are [88] going into the technical questions of corporate law and corporate organization.

JUDGE ALDRICH: We haven't gone far yet. Go ahead.

Q So is the corporate form basically meaningless as far as your activities are concerned?

A I believe I am complying with the law in this particular area. The corporation papers, whatever they have to be, have been established by the attorney, Mr. Glickman, from this state.

Q Are there any corporate directors or corporate officers that oversee your actions?

MR. LUCAS: Objection. This is an issue that is involved in that other case. We could be here all day going into this.

JUDGE ALDRICH: I don't think we are going to be here all day. When that danger arises, we will do something about it. Go ahead.

Q Do you remember the question?

A Were there —

Q I asked you whether there were any corporate directors or corporate officers who oversee your actions at Parents Aid Society.

A There is a Board of Directors.

Q Do they vote approval of your actions or disapproval or do [89] they vote at all?

A All that is handled by an attorney and, as I told you during our deposition, I do not handle much of the business or corporate things. I don't know much about them.

Q Have directors ever voted relative to any action you have ever taken at Parents Aid Society?

A I don't know.

JUDGE JULIAN: Are you a director, too?

THE WITNESS: I don't believe I am.

JUDGE JULIAN: Are you a director of this corporation?

THE WITNESS: I believe I am the director of Parents Aid.

JUDGE JULIAN: There are usually three directors of a corporation. Are you one of those three?

THE WITNESS: I don't think so.

Q As director, will you describe what you understand your duties to be at Parents Aid Society?

A To kind of set the goals and philosophy of our having a low cost facility that will aid and benefit the public in the areas of birth control, abortion and venereal disease.

Q So you set the policy at Parents Aid Society?

A As I said in my deposition, it is more like a family-run issue where a group of us put our heads together.

[90] Q Well, do you have any overall authority over the group?

A One might say technically yes, but in reality, no. It is run and shared by all of us putting our heads together.

Q Do you have authority to disapprove of group decisions?

A I don't know if I have — technically, I know I have not. I know we are close enough that our philosophies pretty well embellish each other.

Q But it is your baby, in your own words, or your dream. If there is disagreement, I take it you would let your dream prevail, wouldn't you?

A But the people who are with me share the same basic philosophy, so there is really very little room for any type of disagreement.

Q Do you employ the people who work there? Are you the one that hires them?

A I see them. The final analysis is made by the group of us.

Q This group you have spoken of, who comprises it?

A Marilyn Morrissey, myself, Dr. Zupnick and whatever volunteers we have around whose opinions I respect.

Q Did anybody appoint you director?

A I don't know about that.

Q Well, you are the director. How did you become a director?

A I confess my ignorance about these things. I don't know.

[91] MR. LUCAS: Objection. This is about the 15th question.

Q Do you set policy for Parents Aid Society?

JUDGE ALDRICH: I couldn't hear you.

Q Do you set non-medical policy for Parents Aid Society?

A I help establish policy with the group of people who work with me.

Q What about medical policy? Do you help establish that?

A Medical policy is directly under the direction of Dr. Zupnick.

Q You have no say in those regards, medical regards?

A I have no say in the final judgment, but if I feel there is something I have to say that is worthwhile, Gerry will listen to me, Dr. Zupnick will listen to me.

Q Did you hire Dr. Zupnick?

A I think the group of us agreed that Dr. Zupnick ought to work with us.

Q You presented him with his agreement to serve as medical director, didn't you?

A I don't think I presented that to him, no.

Q Were you here in court when he testified?

A I heard him say that. I am not sure I agree with that statement. I think one of the other people may have.

Q Did you draft that agreement, that one-sentence agreement?

A No.

[92] Q Do you have any authority to fire Dr. Zupnick?

MR. LUCAS: Objection. This is going on and on.

JUDGE ALDRICH: I think whatever your point is, you have made it ten times, unless you have some point I don't understand.

Q Do you ask for the names of patients when they come in?

A Yes, we do.

Q Do you make any attempt to ascertain whether the name they give is real?

A No, because I feel it would violate their right of privacy?

Q Is this your own personal view?

A No. It is the United States Supreme Court decision's view.

MR. REYNOLDS: I object.

Q That is your view of the United States Supreme Court's opinion?

A The United States Supreme Court has said that if the right of privacy means anything, it is the right of the individual to be free, to decide whether to bear or begat a child, and that case is called Baird v. Eisenstadt.

JUDGE ALDRICH: I suppose it is very difficult for you, Mr. Baird, having lectured in so many places, to remember that you are in a courtroom answering [93] questions and not

lecturing. I wish you would keep that in mind, however. When the question has been answered, that is the time to stop talking instead of rushing in, as you have done on a number of occasions, with a little prefatory remark and embarking on something else.

THE WITNESS: I am trying to answer as best I can, Your Honor.

Q Isn't it a fact, Mr. Baird, that follow-up care by Parents Aid Society is difficult because you do not ask for real names?

A That is not true because approximately 75% of the patients do come back. We emphasize very strongly that we have a phone number, and whether it be the boyfriend or a relative or somebody who they feel close with, in the event of any kind of emergency situation, we could be in touch with them.

Q Do you recall stating at the deposition, "We try to have a follow-up though it is extremely difficult because we never, never as a matter of principle ask for proof of their name"?

A That is right.

Q So follow-up is difficult, isn't it?

A So far as my following them up, but they come to me, and when they come back to our center, then we are able to see them. I interpreted your question as saying [94] my contacting them at their home.

Q That is correct. And that is extremely difficult?

A Right, but we do have numbers where we could reach them.

Q You have answered my question. You had a number where you could reach Mary Moe, II?

A Mary Moe, II has not answered her phone as many people I have tried to reach don't answer their phone.

Q As a matter of fact, she could not be here for a deposition because you could not reach her?

A Because the number I called was not answered. She may have been on vacation. I have no idea.

Q Are the abortions performed at Parents Aid Society only first trimester abortions?

A Yes.

Q What do you do in a situation where a patient comes in who is beyond 12 weeks?

A Beyond 12 weeks, and within the legal limit of 24 weeks set by the United States Supreme Court, we will then refer them to hospitals.

Q Any particular hospitals in Massachusetts?

A I have referred them to hospitals, such as Beth Israel, but very frequently to hospitals in New York as well.

Q In situations where patients, who are minors and are beyond 12 weeks, and do not have parental consent, do you [95] advise them that the hospital will have a requirement for parental consent?

A I let them know that hospitals have their own rules and that they will try to work around those rules or through those rules the best way they can.

Q Do you have a rate of follow-up? Do you have any statistics on follow-up by Parents Aid Society?

A On what, sir?

Q Follow-up on patients. Do you have any statistics as to what the rate of patient follow-up is?

A I think I gave you an approximation, that 75% of them do come back to us four weeks later or six weeks later.

Q Are you responsible for keeping statistics, as indicated on the forms? "Some questions are for statistical purposes only." Do you recall that?

A Yes.

Q Are you responsible for keeping those statistics?

A No.

Q Do you know who is?

A I believe that would be shared by Susan Rogal and myself and probably will be compiled at the end of this year.

Q You indicated that as part of the counseling you try to explain the social pressures that are on the patient.

A Yes.

[96] Q Why do you do that?

A Because sometimes some of the patients reflect guilt saying, "They have murdered their baby". Some of them will reflect, "God is punishing them for having intercourse". And on occasion, parents have called me and said, "Don't help my daughter. Let God punish her."

So with that in mind what I try to establish is that we live in a — I don't want to be lecturing.

Q How do you allay patients with these kinds of fears?

A We try to let them be aware that we live in a sexist society that condones men having intercourse and that we do not permit single women to have intercourse. For instance, Joe Namath or Burt Reynolds, we could dub them as —

JUDGE ALDRICH: No.

Q You think this is the proper way to allay the concerns of patients who express fears such as, "I think I have killed my baby"?

A No. I go beyond that, but because of the pressure of trying to distinguish between lecturing and counseling, it is extremely difficult for me.

Q These patients with the concerns you have mentioned when they say they have killed their baby, are these fears often religious-based?

A Very frequently they are.

[97] Q How do you treat those concerns?

A We try to point out the sexism that does exist in organized religion.

Q Is that your judgment that sexism does exist in organized religion?

A I think it has been well established by most thinking people that it exists by evidence of the fact women themselves have stated it and there are no female priests.

MR. LUCAS: I object to this line of inquiry. I think the Supreme Court decision would permit the facility to operate without any counseling at all.

JUDGE JULIAN: Let me remind you what the Supreme Court said. I refer to Roe v. Wade, Page 153. "Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will [98] consider in consultation."

So it is not, as you suggest, just a matter of going in there and asking for an abortion and getting in under Roe v. Wade.

MR. LUCAS: I was not suggesting that, Your Honor. I think that was part of the rationale for leaving the question up to the physician and patient.

The Court's holding on Page 164 is that in the first trimester "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."

Counseling is part of the paramedical delegation of that judgment with which the state may not interfere.

The state has here been inquiring interminably about matters that are any of the state's business.

MR. BEHAR: I think they are the state's business.

JUDGE ALDRICH: I have great respect for both participants in this discussion. Let's come back to the question that provoked the objection which was: what counseling was given after the abortion?

THE WITNESS: That is what the question was.

MR. BEHAR: I believe we were talking about — it was not specified before or after — we were talking [99] about patients with particular fears.

JUDGE ALDRICH: Can we make it clear because several questions have in my mind related to someone that came in afterwards and felt guilt.

Q Patients have these fears prior to an abortion, don't they?

A Yes, sometimes.

Q And they have them after?

A That can also occur.

Q And regarding both situations —

A Might I point out, since we have followed up with people who go through childbirth, that they also have the same problems after childbirth.

MR. BEHAR: I move that that go out.

JUDGE ALDRICH: That may go out.

Q You think it is appropriate for you as a counselor to impart such counseling advice as "religion is sex oriented", is that right?

A I think it is raised by the patients themselves where there is much hostility as to organized religion.

Q You don't think religious values ought to be learned in the home and the parents ought to be entrusted with those kinds of counseling advices?

A I think they ought to be raised in the home, certainly.

Q But you feel it is proper counseling to impart your own values in this situation?

[100] A I have to realize I am in a courtroom. The statements I made are based on fact. It is well recognized there are no female priests.

Q And that makes organized religion sexist in your judgment?

A Would you like me to tell you that the Orthodox Jew says, "I thank God I am not a woman". That is also another sexist statement. Are you aware of Leviticus, Chapter 12, 1 through 6, "If a woman has —"

JUDGE ALDRICH: Why are we getting into all this? If you want to have it —

THE WITNESS: I would be glad to give you a whole list of sexism.

MR. BEHAR: May I explain why I think it is pertinent?

JUDGE ALDRICH: Go ahead.

MR. BEHAR: It is pertinent because it seems to me that we are dealing here not with a doctor — we are dealing here with somebody who is imparting his own personal views, which are very strong, upon minors in many situations, and it seems to us in areas where the state has a legitimate interest in seeing that the family, for one, and the parents, for another, mold these kinds of attitudes.

I think that in a situation where there is no parental involvement the State's interest is undermined. [101] That is the thrust of the question.

JUDGE FREEDMAN: Are you saying that Mr. Baird is the moving party and has girls come to him for an abortion and is forcing his will upon them rather than the opposite that they come to him for the purpose of getting an abortion?

MR. BEHAR: I am suggesting that once they get there, they are subjected to the personal philosophy of Mr. Baird which, I submit, is neither good counseling technique, as we heard yesterday, nor is it appropriate from the State's interest

relative to family unity and parental protection and care of the children. That is what I am saying.

JUDGE ALDRICH: In what way have you not brought out a foundation for that argument? It seems to me you have made it very clear.

MR. BEHAR: I think it was drawing to an end.

JUDGE ALDRICH: Can we draw it to an end right now?

MR. BEHAR: Fine.

Q Did you make the decision to have counseling sessions in groups?

A Through the years it evolved to become constantly in groups because the patients seem to favor that.

[102] Q Was it your decision to have group counseling?

A That was again, as I say — we are run almost as a commune in the sense that the group of us make the decisions.

Q This was a group decision?

A A group decision.

Q Had you had individual counseling before?

A Before when, sir?

Q Before group counseling was instituted at this particular facility.

A Eleven years ago it was illegal. We were doing it individually because I did not want to run into more witnesses testifying against me in a courtroom when it was illegal to aid people in the abortion problems.

Q Are you saying that counseling at Parents Aid Society in Boston has always been in groups?

A No, sir.

Q It started out individually?

A No, sir.

Q Are you saying it is both?

A On occasion it is individual, on occasion it is group. The patients seem to favor groups.

Q Typically it is groups?

A Typically it is groups and also typically it is individual.

Q The individual only arises in situations where you find there [103] are some problems, is that right?

A Or, if I don't find there is a problem, they will come to me and say, "Bill, I would like to talk to you on the side. I want to talk to your nurse or to the doctor to the side."

Q Do you hire any people who have views contrary to your own personal views on these subjects?

A Do you mean when I hire somebody from Birth Right? No. By "hire" — not that I hire — the group of us have people who work with us whose philosophy is that abortion is an individual choice.

Q So you would not preclude from your counseling staff someone who had moral reservations about the procedure, would you?

A Would I preclude somebody who would feel abortion was immoral?

Q Yes.

A Definitely so.

Q You think that person could not be an effective counselor?

A When I say "definitely so", I mean somebody who would seek to impose their belief.

Q I see. But if the person was objective, you would disregard that person's moral —

A If the person I feel would be objective, yes, or our group would feel would be objective.

[104] Q Do many of the patients who come to see you have questions regarding how they became pregnant?

A So far as technique is concerned, yes.

Q There is a lot of misunderstanding in that area?

A From older people who have used diaphragms for many years as well as younger people.

Q Does lack of understanding in the area of how one becomes pregnant, is that on a par in your view with maturity to understand the surgical procedure?

A No. It points out the problems in our society that does not permit an adequate sex education program in our school system.

Q So you attribute it to societal problems?

A As one phase. There are patients who may be aware of it, but who are not motivated to use birth control.

Q By the way, the first trimester abortion procedure that you counsel about is a surgical procedure?

A The A.M.A. has a definition which I stand by calling it a medical procedure, clearly a medical procedure.

Q You disagree then with the two doctors who testified yesterday and who stated that it is a surgical procedure?

A I disagree with them and I agree with the A.M.A. position that it is a medical procedure.

Q Isn't it a fact that you use the term medical procedure to deliberately minimize the consequences of the procedure [105] and the severity of the procedure?

A On the contrary. I think it is important when you are dealing with people to use whatever authorities are available. The A.M.A. is a recognized authority. If they see fit to use the words medical procedure, I see no reason why I should differ from it.

Q Where is it in the A.M.A. that this is referred to?

A I suggest you look at — on June 29, 1970, at 9:30 A.M., a resolution was passed by the House of Delegates of the A.M.A.: Be it so resolved that it is a medical procedure, not a surgical procedure.

Q They made that distinction?

A Well, they didn't say surgical procedure. They said medical procedure. If you like, I believe I do have a copy of that document somewhere with me today.

Q The two doctors who testified yesterday calling it a surgical procedure, they would not be wrong, would they?

A Doctors have a right to be wrong, I think.

Q You think they are wrong?

A Yes.

MR. LUCAS: Objection to this line of inquiry.

JUDGE ALDRICH: I was brought up to believe it was improper to ask somebody whether somebody else's view was right or wrong. You can ask him about his own view.

[106] MR. LUCAS: The Supreme Court decision at Page 143 quotes the A.M.A. position and says it is a medical procedure.

Q You referred to the 1967 prosecution of yourself.

A That's right.

Q Who was Attorney General at that time?

A The same Attorney General in the State today, Mr. Quinn.

Q Are you sure about that?

A I believe so.

Q When a minor comes in and says she has gone through the procedure, how do you ascertain whether that is, in fact, the case?

A By her telling me that she has gone through it. During the exchange she will say to me — as we say in the form — "Why do you want to have an abortion?"

"I want to finish school" or "I don't want to get married. I'm too young." They will give reasons they feel are perfectly valid to themselves.

Q In situations where a minor does not want to inform her parents, do you inquire as to the reasons for that?

A Yes, I do. Most frequently there are two. One is fear of violence, of being beaten, and the other is great love for their parents, the fear of hurting them.

I might also point out there have been enough [107] occa-

sions where parents have brought their minors down and demanded that they be aborted and we have refused to do that.

Q You accept any reason a minor might give for wanting the procedure?

A As I would accept the reason for any other human being.

Q There is no reason you would find unacceptable that would be advanced by a minor?

A None that I can think of in my eleven years of experience.

MR. BEHAR: May I have a moment?

JUDGE ALDRICH: Yes.

Q If one of the reasons that is advanced by a minor for not wanting to inform her parents is fear that the parents will then know she has had sexual intercourse, that in your view is a valid reason for not informing the parents?

A Based on my experience with parents beating up their children for having had intercourse, yes.

Q In the counseling sessions you conduct, do you give any emphasis to possible psychological reactions to the procedure?

A If it were to come up, it would come up in the form we discussed earlier, the feeling of perhaps guilt, and that will usually be tied into society's pressures of single [108] women not having intercourse or religious pressures.

Q Do you give this counseling on the psychological pressures prior to the procedure?

A As and if it comes up. In other words, it is not routine.

Q Has Parents Aid Society refused to perform an abortion upon a minor where the minor wanted one?

A Yes.

Q Were the reasons purely medical?

A As I understand, medical or they were beyond the legal stage of gestation for an abortion.

Q Have you encountered minors who in your judgment could not give an informed consent to this procedure?

A In eleven years I can think of none.

Q You can think of none?

A Not offhand.

Q That is your experience?

A Yes.

Q Are abortions the main source of the revenue of Parents Aid Society?

A Abortions, birth control, V.D. testing and some funds that I give in through my lecturing and occasional donations.

Q Do you have any information as to the youngest minor that has been aborted at Parents Aid Society without parental [109] consent?

A I believe the youngest was 12 years of age.

Q Was that at Parents Aid Society in Boston?

A No, that was in New York.

Q What about Boston?

A I think perhaps 13 or 14.

Q Typically, when does the first follow-up for a patient occur?

A Generally during the counseling when it is almost over we emphasize the urgency and importance of their being in contact with us four to six weeks later. It is generally in that time they will come back for a checkup.

Q Do you consider yourself the father of abortion?

A I believe United Press International has called me that and many other people across the United States have called me one of the national figures in the public's right to abortion, yes.

Q Do you regard yourself as such?

A No. I think I regard myself as a fighter for the human right to make the decision whether to have an abortion or not, so I would call myself the father, perhaps, of the human rights decision in the area of reproductive control.

Q You would like to think of yourself in that way?

A No.

MR. LUCAS: Your Honor, I think this line of [110] inquiry is very interesting, but I don't see how it is relevant to the case.

JUDGE ALDRICH: Yes.

Q Are you a doctor licensed to practice medicine?

A No.

Q Do you, yourself, perform abortions?

A No, sir.

Q Have you had any personal contact with the Attorney General regarding this particular statute?

A No, sir.

Q Have you had any personal contact with any District Attorney regarding this particular statute?

A No more than I did in 1967.

Q I ask you again, have you had any personal contact with any District Attorney regarding this statute? Yes or no, if you can answer.

A No.

MR. BEHAR: I have no further questions.

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CROSS-EXAMINATION BY MR. REYNOLDS

Q Mr. Baird, in cross-examination you declined to give the address of your family here in Massachusetts through concern about their well-being.

JUDGE JULIAN: Keep your voice up, please.

MR. REYNOLDS: Yes, sir.

[111] Q I take it you are married and do have a family?

A Yes, I do, sir.

Q And are you willing to tell us the number of children you have?

A I would rather disclose nothing about my family, sir.

Q Nothing at all?

A No, other than I love them.

Q You feel you have to be protective of them?

A When I have people who threaten to dynamite them and stab them and shoot them and the fact that such attempts have been made, yes, I feel very protective toward them.

Q Mr. Baird, do you hold an office in Parents Aid Society, Inc., which was incorported in Boston?

MR. LUCAS: Objection. This is repetition. We have been over this.

MR. REYNOLDS: I beg your pardon. This question has not been asked before.

JUDGE ALDRICH: Go ahead.

A I really don't know.

Q You really don't know?

A No. I do not handle the legal part. I am not sure.

Q Have you ever represented yourself to be an officer of Parents Aid Society, Inc.?

MR. LUCAS: I object unless some link can [112] be put between the parents' interest and whether or not Mr. Baird is an officer.

JUDGE ALDRICH: At the present moment, he is sounding out the witness for impeachment purposes or something. He may go ahead.

Q May I have an answer?

A The term impeachment — I don't know what that means.

JUDGE ALDRICH: Possibly he doesn't want to believe everything you say.

A Okay. Forgive me. Would you state the question again?

Q Yes. Have you ever represented yourself to be an officer of the corporation known as Parents Aid Society, Inc., which was incorporated here in Massachusetts?

A I generally regard and represent myself as director. I think back in our deposition, although I am not sure, I might have said that I was an officer. I'm not sure.

But again I repeat, as I said during the deposition, I am really vague on all these things that are not handled by me.

Q As a matter of fact, Mr. Baird, in the very pleadings in this case didn't you sign a verified complaint in your capacity, you said, as President of Parents Aid Society?

A Okay, if that is the legal term, that is the legal term.

Q Do you have any recollection of being appointed President [113] of Parents Aid Society, Inc.?

A I don't recall that at all. I think it was just a general agreement.

Q You do recall when the corporation was formed, do you not? Wasn't it formed in July of 1973 here in Massachusetts?

MR. LUCAS: Objection. The intervenors have been doing nothing but asking questions about corporation law. I don't know what their interest is in this case that has to do with corporation law. It amounts to harassment of the witness.

JUDGE ALDRICH: It doesn't sound very harassing to me. You may go ahead.

MR. REYNOLDS: Thank you, Your Honor.

A I don't know.

Q You don't remember that?

A I am totally vague on all issues concerning business.

Q You do know it was not in existence before 1973, don't you?

A The formal —

Q Parents Aid Society, Inc.

A I don't know the date.

Q I show you this and ask you if that refreshes your recollection.

A I can't read it. I don't have my glasses.

Q Do you have them here in the courtroom?

[114] A No, I do not, sir. I did not know I would have to read.

MR. REYNOLDS: May it be marked for identification?

JUDGE ALDRICH: Yes.

A If it would make it easier, somewhere along that path of time I am sure the organization was incorporated. As to the date, I don't know, sir.

Q You do remember the name of the attorney in town that did it for you, don't you?

A Yes. He is a personal friend, Mr. Glickman.

Q You knew there was a fee in connection with it of $30?

A That, I do not know.

Q Whatever the fee was, did you pay it?

A That, I do not know.

MR. LUCAS: Objection. The filing fee for corporate papers is a thousand miles removed from the issues of this case.

JUDGE ALDRICH: It is getting way off.

Q The statistics which are referred to in Exhibit 10 which were being compiled by somebody, in cross-examination you said you thought they were being compiled for release or compilation at the end of this year; is that correct?

A Probably.

[115] Q Have you been observing their progress at all? Have they been analyzed at intervals?

A Not scientifically analyzed, but a general feeling can be imparted in some areas.

Q In the year 1974 do you know how many abortions were performed here in Boston?

A I do not know exactly.

Q Do you have a good working estimate?

A I am not sure.

Q Do you have any idea of the number of abortions which were preformed at Parents Aid Society, Inc. in the year 1973?

A I do not know.

Q Do you have an informed opinion as to the relative number of patients who come to Parents Aid Society, Inc. who are minors?

A A rough guesstimate.

Q I don't think that ought to be received. You say that Parents Aid Society is run as a family operation. Did you mention the name of Morrissey, Miss Morrissey?

A I think I used the term — it was more of a commune concept.

Q Commune concept?

A Yes.

Q You said that and not family?

[116] A I believe that was the term I used. Ms. Morrissey is a registered nurse.

Q I'm sorry?

A Ms. Morrissey is a registered nurse.

Q Is she here in the courtroom?

A Yes, she is in the courtroom.

Q Would you be good enough to point her out, please?

THE WITNESS: Mr. Lucas?

MR. LUCAS: We are interested in calling her as a witness.

JUDGE ALDRICH: She may stand, if that will help counsel.

MR. LUCAS: But not today.

(Ms. Marilyn Morrissey stands.)

MR. REYNOLDS: Thank you very much.

Q Is it your opinion, Mr. Baird, our society condones men having intercourse?

A I think it has been clearly established.

Q I did not ask you that, sir. I asked you if that was your opinion.

A I think it is a fact, sir.

MR. LUCAS: I object to any further inquiry into this. I think it is irrelevant. I wish the intervenors would get to the interests of the parents.

JUDGE ALDRICH: In what way are you not [117] repeating?

MR. REYNOLDS: I was going to ask the witness if he was familiar with the law as it applies to fornication.

JUDGE FREEDMAN: What difference does that make?

MR. REYNOLDS: Well, I wanted to see if he was aware of it, and whether he realizes that there are laws that prohibit fornication.

JUDGE ALDRICH: Then we would go into a discussion as to how many prosecutions there have been under that statute.

MR. REYNOLDS: I wasn't planning to go into that, Your Honor.

JUDGE FREEDMAN: I think we are dealing with the constitutionality of one statute at this time.

MR. REYNOLDS: I think, if Your Honor please, there is a whole host of statutes which are involved in the distinction which you gentlemen will have to make with regard to the constitutionality of Section 12P.

JUDGE JULIAN: Don't you assume that the Court has access to those statutes?

MR. REYNOLDS: Yes, I do, sir, and I plan to put them into evidence.

JUDGE JULIAN: You don't have to. We can [118] take judicial notice of them.

MR. REYNOLDS: I was going to ask that you do that, Your Honor, and to make it easier I was going to submit them to you.

JUDGE ALDRICH: All right. Let's go ahead then.

Q Now, you pointed out in regard to your familiarity with the revenue which comes to Parents Aid Society that it came from several sources, some of which were donations by

you from your fees as a lecturer and from other items. What proportion of the revenue to Parents Aid Society is generated by abortions?

A I do not know.

JUDGE FREEDMAN: Let me ask you this question, Mr. Baird. Dr. Zupnick testified that 50% of the abortion fees are shared in by him and the balance going to the association. You have already testified that you do not share in any proceeds. You do not claim to have any fees.

THE WITNESS: In eleven years I have made a deliberate point of that.

JUDGE FREEDMAN: What happens to the balance of the 50% that comes in from the abortions themselves?

JUDGE JULIAN: Two-thirds.

JUDGE FREEDMAN: I thought he said 50%. [119] Two-thirds would be going back to the association itself then. Is that the balance that is claimed as overhead and the expenses of running the clinic and the salaries and supplies, or what happens to the balance?

THE WITNESS: I hate to sound so dumb, but I really do not follow that. There are the expenses that you outlined, including legal fees.

JUDGE FREEDMAN: My question is, is it a profit-making organization?

THE WITNESS: By no stretch of the imagination is it a profit-making organization. We are struggling month to month to keep the place open.

JUDGE JULIAN: Do you have an expense account?

THE WITNESS: No, sir.

JUDGE JULIAN: Do you have a drawing account?

THE WITNESS: No, sir. I drive —

JUDGE JULIAN: Supplied by Parents Aid Society?

THE WITNESS: No, sir. Every penny —

JUDGE JULIAN: What becomes of the two-thirds of the total income?

THE WITNESS: As I understand it, it goes into salaries, it goes into rental, it goes into incredibly high insurance rates, it goes into legal fees, and it goes [120] into those kind of expenses, but not one penny has come to me in eleven years for expenses for salaries, for anything from this movement as director of Parents Aid Society.

Q Mr. Baird, are there any funds from Parents Aid Society which are paid to your wife as President of the corporation?

A There are some funds that were given starting for the first time in eleven years this year because I was not earning enough money to feed her and the family.

Q In fact, Mrs. Baird is the President of your corporation, is she not?

A No, sir, I don't believe so.

MR. REYNOLDS: I now submit this as evidence, Your Honor. This is a certified copy of the corporate charter of Parents Aid Society, Inc.

MR. LUCAS: We object to this whole line of inquiry on corporate matters by the intervenors. This is serious harassment. It is wasting the Court's time. It is irrelevant to the intervenors' interests.

The intervenors are supposed to be representing parents and not the Secretary of State. Their questions all pertain to the Secretary of State. This is just harassment. We could spend the entire week here on whether or not the corporation was organized properly.

JUDGE ALDRICH: May I see the document?

[121] MR. REYNOLDS: Yes, Your Honor.

JUDGE JULIAN: How long an examination do you think you will have, Mr. Reynolds?

MR. REYNOLDS: Not very long, Your Honor. I would hope we could finish by the lunch hour.

JUDGE ALDRICH: Do you think you will be able to finish by that time?

MR. REYNOLDS: I suspect that I will.

JUDGE ALDRICH: And you will have some more, Mr. Behar?

MR. BEHAR: Maybe one question.

JUDGE ALDRICH: How about the re-direct?

MR. LUCAS: There will be very little re-direct, Your Honor.

JUDGE ALDRICH: All right. We will finish with Mr. Baird.

MR. REYNOLDS: All right. I might point out that that is part of the pleadings in this case, Your Honor.

JUDGE ALDRICH: Is it attached to the Complaint?

MR. REYNOLDS: It is in the Intervenors' Answer. I think we answered that it is a Chapter 180 corporation, a charitable corporation.

JUDGE ALDRICH: For whatever it is worth, we will take it.

[122] JUDGE JULIAN: Who is Evelyn Baird?

Q That is your wife, is it not, sir?

A Yes.

MR. REYNOLDS: I have copies for the Court.

Q What services does Mrs. Baird perform for the corporation, Mr. Baird?

A She helped design the place. She helped set it up.

JUDGE JULIAN: I can't hear you.

THE WITNESS: I beg your pardon. Originally she helped design and set up the facilities. On occasion, she might even have acted as supervisor, coming in to see that everything was under control, that everything was being done properly. She is there sporadically.

Q She is there what?

A Sporadically, not every day. Some days she may be there all the time and sometimes she may not be.

Q What is the amount of her remuneration from the corporation?

A I strongly refuse to answer.

MR. LUCAS: Your Honor, this is getting further and further away from the issues in the case. Mr. Reynolds is playing the role of Secretary of State. He could inquire forever on issues having nothing to do with the issues in this case.

[123] JUDGE JULIAN: The position of the plaintiffs is that it is a non-profit corporation. I think the purport of the question is to see whether or not what may be disguised as something other than a profit is in fact a profit, whether or not money is being siphoned off from the corporation and paid in the form of compensation to Mrs. Baird, and how much it is and whether or not she is rendering any service, and this is to determine whether or not this is a non-profit corporation as claimed by the plaintiffs.

MR. LUCAS: The witness has already testified as to the services. It is not an issue as to whether it is a non-profit corporation or not.

MR. REYNOLDS: I would certainly say —

JUDGE ALDRICH: All right. Go ahead.

Q May I inquire about the amount of remuneration Mrs. Baird receives from the corporation?

A Mr. Lucas? If I say no, am I held in contempt?

JUDGE ALDRICH: What is that?

THE WITNESS: I would like to know if I say no, am I held in contempt? There are certain principles I feel very strongly about which I will indeed face jail for if I feel there is an invasion of the right of privacy.

JUDGE ALDRICH: The amount that Mrs. Baird is paid from this corporation you feel is a matter of [124] privacy?

THE WITNESS: I believe very much so since I feel the opposition is really a group called The Right to Life, which has very much been on my back for many years.

JUDGE ALDRICH: That is no responsive to my question. I asked you a much simpler one.

THE WITNESS: Well, I answered it as best I could, sir.

JUDGE ALDRICH: You have described yourself as a non-profit —

MR. REYNOLDS: — charitable corporation.

JUDGE ALDRICH: — non-profit P.A.S.

THE WITNESS: That, I do not know. That is what the attorneys have set it up as and that is what I believe it to be.

JUDGE ALDRICH: And what is your position, Mr. Reynolds, as to whether or not it makes any difference whether it is a profit or non-profit organization?

MR. REYNOLDS: Well, if Your Honor please, I think that goes to the very heart of the matter. If this man and his corporation are simply alter egos, one for the other, and if he has his wife — as I understand our law, he and she are a unity, if funds from the corporation are being paid to her they are, in fact, being paid to him.

[125] JUDGE ALDRICH: If they are being paid to her not any larger than for services rendered, how does that affect your argument? I am not saying that that is the case.

MR. REYNOLDS: Well, I think that is an area of inquiry.

JUDGE ALDRICH: That isn't quite my question. If it were to appear that she was being paid no more than she was entitled to for services rendered, what relevancy would this line of inquiry have?

MR. REYNOLDS: Well, I think, if Your Honor please, that it is a legitimate line of inquiry.

JUDGE ALDRICH: Let me put it this way. There are many hospitals in the City of Boston that describe themselves as non-profit hospitals. The Treasurer of that hospital may

be a trustee and he may be paid. Does that mean it is not a non-profit hospital?

MR. REYNOLDS: No, sir.

JUDGE ALDRICH: Well, then haven't you got to show something more? I am not saying that you may not be able to do it.

MR. REYNOLDS: Well, among other things, Your Honor, I think it poses the problem of conflict of interest between Mr. Baird and the plaintiff. He is a plaintiff in the case as is his corporation.

[126] JUDGE ALDRICH: She has got a job, and even if she is paid no more than she has earned, that makes him an interested party?

MR. REYNOLDS: It makes him an interested party with regard to the funds which are generated by the corporation that he poses to be a charitable corporation, and I think that that is what Chapter 180 is about, and I think there have been a number of cases which have said that for the particular civil action whether or not a corporation is a charitable corporation is open to evidence for a determination.

JUDGE ALDRICH: What I am asking you is whether you would make that claim irrespective of whether she got paid, whether her services were worth that or more than that.

MR. REYNOLDS: Well, surely if she was paid more —

JUDGE ALDRICH: Even if she was paid only what they were worth, would you still make that claim?

MR. REYNOLDS: I'm sorry, sir?

JUDGE ALDRICH: If she was paid what her services were worth and no more, would you make that claim?

MR. REYNOLDS: I think I would, yes. I would.

[127] JUDGE ALDRICH: All right. You have established enough and we can drop it.

MR. REYNOLDS: Thank you, sir.

Q May I have an answer to the question?

JUDGE ALDRICH: No. I said you have established enough. She is paid, so let's drop it.

THE WITNESS: Thank you.

Q Do you know whether or not Parents Aid Sciety, Inc. has filed any report at all with the Secretary of State's Office since it was set up?

A I don't know, sir. I believe that is handled by the attorneys.

MR. REYNOLDS: I would like to submit this in evidence.

THE CLERK: Defendants' C for Identification.

MR. LUCAS: Your Honor, we object to any further inquiry as being beyond the scope of the interests of the intervenors.

JUDGE ALDRICH: The distinction between the Intervenors and the Commonwealth, whoever else Mr. Behar represents. might be a good technical point, but the Court is not disposed to raise it. The conclusion I draw is that counsel have made a general effort to divide [128] up the examination.

MR. REYNOLDS: Yes, sir.

JUDGE ALDRICH: As to the matter of the corporation, whether it has been properly organized or anything else, the corporation is a plaintiff named in this case, and I do not propose to cut counsel off from demonstrating anything wrong about it, if there is something wrong about it.

MR. LUCAS: We would think that they would have to show, first of all, there is some basis for denying relief in the case or if they have some contentions, and if the corporation does not comply with their position. As it is, all they are doing is wasting the Court's time.

JUDGE ALDRICH: I think with all due respect to you, we are spending more time listening to your objections than to the answers to the questions.

MR. REYNOLDS: I would like to submit that, if Your Honor please.

JUDGE ALDRICH: I want to make it very clear that in accepting these exhibits the Court does not rule that they are relevant.

MR. REYNOLDS: Yes, sir.

JUDGE ALDRICH: It is already one o'clock.

MR. REYNOLDS: I'm sorry, sir.

JUDGE ALDRICH: I think we'd better make it [129] quarter past 2:00. Are you almost through?

MR. REYNOLDS: Yes, I am.

Q Mr. Baird, do you participate in the composition of the ads which are put into the newspapers here in Boston?

A No.

Q You do not participate?

A No. I review, but I do not participate.

Q Who does prepare those ads?

A I believe it is the group, and there is an agency called — I'd better not give their name.

Q They put the ads in?

A Yes.

MR. REYNOLDS: That concludes my examination.

JUDGE ALDRICH: Mr. Lucas?

MR. LUCAS: I don't believe I have any re-direct examination of this witness.

JUDGE ALDRICH: Mr. Behar?

MR. BEHAR: I just have one question.

• • • • •

[130] Q You mentioned that the difference in the amounts of money — that some goes to the doctor and some is retained by Parents Aid Society, and I think you indicated that the amount retained goes to legal fees in part; is that right?

A Some of it goes to legal fees, yes, as well as to other expenses, rent.

Q Does that include suits such as this?

A This particular suit, yes.

MR. BEHAR: I have no further questions.

THE COURT: Can you finish with Mary Moe in three-quarters of an hour?

MR. LUCAS: We could finish the direct examination probably in 20 or 25 minutes. I can not speak for the intervenors or the defendants.

JUDGE ALDRICH: Judge Freedman has to leave at three o'clock. Do you have a long cross-examination?

MR. BEHAR: It depends on what is covered in the direct.

JUDGE ALDRICH: Well, we will take a shot at it. 2:15. It will be in camera in whatever that Court of Appeals conference room is. I don't remember the number, but it is on the 16th floor.

(recess.)

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[2] THE CLERK: William Baird, et al v. Robert Quinn, et al.

JUDGE ALDRICH: Do you care to make an opening, Mr. Behar?

MR. BEHAR: No, Your Honor. I would make one statement and that is that we do have on file a Motion to Dismiss framed in the alternative as a Motion for Summary Judgment and we submit as a matter of law that motion should be granted at this time, as we see it, because there has been established no acts of any defendant which have deprived anyone of any rights and because there has been no threat of enforcement of the statutes in question against anybody.

There has been a failure to set forth a cause of action under both the Civil Rights Act statute and the Declaratory Judgment Act statute. The case of Steffel v. Thompson, which has been decided recently by the Supreme Court, requires that at least as to declaratory judgments, there must be a showing of bad faith of enforcement before a party has in effect standing to challenge a criminal statute, that is, either on its face or as applied. We would press the motion at this time, and if it is denied or denied without prejudice, we are prepared to go forward with our witnesses.

JUDGE ALDRICH: The Court will not pass on the motion at this time.

[3] MR. BEHAR: Very well. The defendants call Dr. Jules Rivkind.

• • • • •

JULES RIVKIND (SWORN)

DIRECT EXAMINATION BY MR. BEHAR

Q Would you please state your name and address for the Court, spelling your last name?

A Jules Rivkind, R-i-v-k-i-n-d, Pittsburgh, Pennsylvania.

Q What is your occupation?

A Physician specializing in obstetrics and gynecology.

Q Are you licensed to practice medicine in some states?

A Yes.

Q Would you identify them?

A New York, Connecticut, California, Pennsylvania.

Q What is your current position?

A Chairman of the Department of Obstetrics and Gynecology at Mercy Hospital and Director of the Residency Training Program.

Q How long have you held that position?

A Since January 1, 1971.

Q Could you state your duties and responsibilities in these capacities?

A As Chairman of the Department in consultation with our staff we establish policies and assure the implementation of those policies within the department, and act with the other chairmen in establishing generalized [4] medical policy for the hospital and to act in concert with the other ancillary services, the nursing services, and so forth, to ensure the highest possible patient care.

Q Will you briefly sketch for the Court your medical training?

A I was graduated from the New York University College of Medicine in 1955 with an M.D. degree. I next took a surgical internship at St. Vincent's Hospital Medical Center in New York, followed by two and a half years as a flight

surgeon in the United States Air Force specializing in the transportation of patients requiring total respiratory assistance.

I returned to New York for four years of training in obstetrics and gynecology at St. Vincent's Hospital Medical Center. This was followed by a year of fellowship during which time I was in charge of the teaching program for the medical students at what at that time was Seton Hall Medical School, which later became the Medical School of the State of New Jersey.

I then joined the Chairman of the Department as his associate in practice, eventually becoming chief of clinical obstetrics.

Q Could you sketch in any other detail your clinical background in addition to your present position?

A In addition to that, during my tenure in New York [5] I acted for several years as a consultant and clinician to the New York City Health Department specifically in the areas of psychology and juvenile venereal disease.

Just prior to leaving, we also incorporated the in-patient service at Columbus Hospital in New York City, and I became chief of clinical obstetrics at Columbus Hospital as well.

Q I show you a four-page document and ask you to identify it.

A Yes. This is my curriculum vitae.

MR. BEHAR: I would offer this as an exhibit.

THE CLERK: Defendants' Exhibit D for Identification.

JUDGE ALDRICH: No, it is in evidence.

THE CLERK: D in evidence.

(Curriculum Vitae of Jules Rivkind, M.D. marked Defendants' D.)

Q Doctor, do you routinely keep up with the literature regarding obstetrical and gynecological problems?

A Yes, I do.

Q Are you familiar with techniques for termination of pregnancy?

A Yes, I am.

Q Could you identify those techniques?

A There are several. The most widely used at the present time is dilation and curettage, followed by vacuum aspiration, saline abortions and hysterotomies are also used.

[6] Q Have you had occasion to utilize these techniques yourself in the course of your professional practice?

A Yes, I have.

Q There arise occasions when continuation of pregnancy may be detrimental to the life of the mother or fetus, usually both. In those instances a premature delivery, a termination of pregnancy without prejudice, is frequently indicated. We act in consultation with those experienced in the specialized fields of medicine and will terminate the pregnancy without prejudice as far as the outcome goes.

JUDGE FREEDMAN: You mean as far as future pregnancies?

THE WITNESS: No, as far as that particular pregnancy and the infant. Our end point is a living baby and a healthier mother. I have not performed abortions using these techniques.

JUDGE ALDRICH: I didn't get the last few words.

THE WITNESS: I say I have not performed abortions using these techniques. But these techniques are not unique. They are used for a wide variety of purposes.

Q I think, to help the Court, you draw a distinction between abortion and termination of pregnancy, as I understand it?

[7] Yes, I do.

JUDGE FREEDMAN: Is another name for this procedure forced labor to bring about delivery?

THE WITNESS: Induced or forced labor, yes. With the Court's indulgence, I would like to say that the end point is different.

Our purpose is to ensure, as I said, a healthier mother and a live birth.

JUDGE ALDRICH: What about first trimester procedures? Have you ever performed any?

THE WITNESS: Not in the abortion context.

JUDGE ALDRICH: In what context have you performed them?

THE WITNESS: When presented with a patient who has an incomplete abortion, we will complete it using these techniques.

JUDGE ALDRICH: Suppose the patient has had no incident of abortion?

THE WITNESS: These techniques are also used for diagnostic purposes.

JUDGE ALDRICH: The question was have you used them?

THE WITNESS: Yes, I have. We have also used them in the instances of missed abortions when the pregnancy has begun but then has ceased, the patient has failed to pass the products, we will perform these same techniques.

[8] Q Doctor, in the course of your professional practice do you have occasion to treat women who have had abortions?

A Yes, I do.

Q About how many such patients have you treated?

A The number varies from week to week, but I would say on the average of four to five a week.

Q Do these patients include adolescents under 18 years of age?

A Yes, they do.

Q Under what circumstances do you treat patients postabortally?

A For post-abortal complications primarily.

Q How do these patients come into the Mercy Hospital, for example?

A Being a downtown hospital with a very active emergency room and a gynecological clinic, we accept for treatment any woman who presents herself to us. We have an active downtown clinic, abortion clinic, which has limited hours. They do not have 24-hour service. Frequently, the patients are told that if a problem arises, to come to the nearest hospital.

Q What complications following abortion have you been concerned with among these patients?

A Well, the majority of the patients present themselves either with fever or pain, which is indicative of infection, or with excessive prolonged bleeding or blood loss.

Q Are these considered major complications from this procedure?

A Yes.

Q Are these complications discussed in the medical literature?

A Yes, they are.

Q Doctor, based upon your education, training and experience, do you have an opinion as to whether the complications you have mentioned pose a greater risk to adolescents under 18 as opposed to adults?

A Yes, I do.

Q What is your opinion?

A That they do indeed pose a greater risk, not only in terms of immediate complications, but in terms of their implications for future reproductive history.

Q What are those implications?

A The literature from throughout the world suggests that in the interruption of a first pregnancy subsequent pregnancies are exposed to increased risks in all aspects of obstetrical

practice, including premature deliveries, spontaneous mid-trimester abortions, faulty implantation with errors of placental development.

MR. LUCAS: I object to the question. There is a lack of foundation. I think there is no basis for this opinion. He referred to the literature throughout the world without giving us any description of it.

[10] JUDGE ALDRICH: He may answer.

Q Is your opinion, in addition to your education, training and experience, also based upon your studies of the literature?

A Yes, it is.

Q Would you please continue.

A The incidence of cervical incompetency was well established long before the present interest in abortion. Most obstetricians when interviewing patients for the pre-natal history would inquire as to whether or not there has been any interruptions of pregnancy prior to that pregnancy under care. Their blood loss tends to be greater.

In addition to that, the incidence of dystocic labor, labor which has progressed badly or poorly, is increased in women who have had one or more abortions. Not only that, but from the literature, and here we would depend upon the literature particularly from Eastern Europe, there is an increased incidence of spontaneous abortions in women who have had previous therapeutic abortions.

JUDGE ALDRICH: Doctor, if I understood the question that was asked you and which you have been answering, it was whether or not there was any greater risk with respect to minors having abortions than those who are not minors.

THE WITNESS: Yes.

[11] JUDGE ALDRICH: Are all those things you are telling us more noticeable, more likely in the case of minors than they are in the case of adults?

THE WITNESS: Yes, sir, because for the minor the pregnancy under consideration tends to be their first and the woman —

JUDGE ALDRICH: That does not answer my question. If I am 24 year old woman, it may be my first, too. Are you drawing a distinction between an 18 year old woman and a 17 year old woman?

THE WITNESS: No. The distinction —

JUDGE ALDRICH: Excuse me?

THE WITNESS: The distinction I am drawing is between a woman in her first pregnancy, having an interruption, and a woman who has an interruption after several pregnancies and probably will have no other pregnancy in the future.

JUDGE ALDRICH: All right. I will note for the record that none of your answers have been responsive to the question, but they may stand.

Q Doctor, what does the term morbidity mean in relation to abortion?

A Complications.

Q Are the complications you have enumerated in your last answer typical of morbidity problems?

A Yes, they are.

Q Doctor, based upon your education, training, experience [12] and studies of the literature do you have an opinion as to the state of medical knowledge on morbidity problems?

A Yes.

Q What is that opinion?

A It is woefully lacking.

JUDGE ALDRICH: None of us heard what is woefully lacking.

THE WITNESS: Knowledge of morbidity concerning therapeutic abortions.

JUDGE JULIAN: What do you mean by morbidity?

THE WITNESS: Morbidity would be complications taken as a general class.

JUDGE ALDRICH: It is woefully lacking where — in this courtroom?

THE WITNESS: In the medical profession.

JUDGE ALDRICH: All right. Why don't you say so?

THE WITNESS: I have, sir.

MR. BEHAR: I'm sorry. That was the question.

JUDGE ALDRICH: We didn't hear any of it.

MR. BEHAR: I'm sorry.

Q Doctor, based upon your education, training, experience and studies of the literature, do you have an opinion whether a therapeutic abortion is a safe procedure?

A Yes, sir, I do.

Q What is that opinion?

[13] A That it is not.

Q And could you explain the reasons for that opinion?

A Although there is a great deal of divergence in morbidity rates, and that is what tempered my answer to the previous question, the average rate appears to be about 8% to 9% morbidity in early abortions. This, for an elective operation, is a rate which most individuals would find unacceptable.

Q Does Mercy Hospital do elective surgery?

A Yes.

Q Do you have patients showing up with complications at the same rate for those procedures as show up with complications for abortions?

A Only for the most serious of operations. May I explain?

Q Yes, please.

A Our morbidity or complication rate for radical hysterectomy is approximately 10%. Anyone will question the circumstances under which an elective operation is performed if the complication rate is much more than 5%.

Q In the course of your professional career, have you delivered babies?

A Yes, I have.

Q Approximately how many?

A Perhaps, well, almost 10,000.

Q Did the mothers involve adolescents under 18?

[14] A Yes.

Q Based upon your education, training, experience and studies of the literature, do you have an opinion as to whether childbirth in an adolescent poses a greater risk than childbirth in an adult?

A Yes.

Q What is that opinion?

A Based upon the latest information, it does not carry a greater morbidity threat. May I expand?

Q Please do.

A Recently a collaborative study was completed which encompassed some 60,000 pregnant women. The findings of that study ran contrary —

MR. LUCAS: Objection, unless he identifies the study and participated in it. Otherwise, he is just telling us what is in a periodical which we have no knowledge of.

JUDGE ALDRICH: The name of that study was what?

THE WITNESS: Collaborative Study — Women and Their Pregnancies.

JUDGE ALDRICH: Who made it?

THE WITNESS: There were several authors.

JUDGE ALDRICH: Were you one?

THE WITNESS: No, I was not.

JUDGE ALDRICH: I think the best answer to that would be to produce it.

[15] MR. BEHAR: Are you excluding the further answer?

JUDGE JULIAN: I think it should be admitted.

JUDGE ALDRICH: I don't question it should be admitted, but a summary of a study as a distinct study — the best evidence is what is the study itself.

MR. BEHAR: I won't press the question.

Q Doctor, based upon your education, training, experience and studies of the literature, do you have an opinion whether therapeutic abortion constitutes a greater medical risk to an adolescent under 18 than delivery?

A Yes, I do.

Q What is that opinion?

A They carry about equal risks.

Q In your judgment, is therapeutic abortion a surgical procedure?

A Yes, it is.

Q Do you yourself regularly perform gynecological surgery?

A Yes, I do.

Q Upon both adolescents under 18 and adults?

A Yes.

Q Based upon your education, training, experience and studies of the literature, do you have an opinion as to what constitutes proper and accepted medical practice regarding obtaining parental consent for surgery being performed upon a minor?

A Yes.

[16] Q What is the opinion?

A That with the exception of the situation in which any delay would be hazardous to the life of the patient, we attempt to involve the patient in the permission for whatever procedure is going to be performed.

Q What do you understand the policy reasons behind this accepted medical practice as you see it?

A That the minor has not that basis of experience to make a valid judgment as to the necessity for the procedure or the safety of the procedure.

Q Is it proper medical practice to obtain parental consent on the type of anesthetic or the kind of anesthesia being employed?

A Consent is required for several aspects of any procedure and anesthesia is one of them, and blood transfusion is another, in addition to the operation itself.

Q Is an accepted medical practice in your judgment not to obtain parental consent where local anesthesia is employed?

A No. We obtain consent whenever anesthesia is employed.

Q Is there any medical reason why parental consent should not be obtained for abortions?

A No.

Q Regarding the adolescent, and by that I mean under 18, patients that you have treated who have suffered abortion [17] complications, do you routinely discuss the abortion operation with them?

A It is a necessity, yes.

Q Why do you do that?

A In order to ascertain what the cause of the problem was.

Q In the course of these discussions, do you form opinions as to their understanding of that operation?

A Yes, I do.

Q Doctor, based upon your education, training, esperience and studies of the literature, do you have an opinion as to whether 16 year olds as a class can give an informed consent to an abortion?

A Yes, I do.

Q What is that opinion?

A It is my opinion that they do not have the basis of experience for making an appropriate judgment.

Q Have any of the adolescents under 18 you have treated for abortion complications obtained the abortion without parental consent in some instances?

A Some have, yes.

Q Were the parents notified relative to the complications?

A Yes, they were.

Q Did you have occasion to discuss the reasons why the parents were not notified of the abortion originally?

A Yes.

Q What were some of those reasons?

[18] A Primarily on the part of the patient hesitancy to discuss the subject with her parents. There is usually an antecedent problem in the family relationship. Occasionally, it is a fear of reproach, reprimand, and occasionally it is because of a total inability to discuss matters of sexuality between the adolescent and her parents.

Q Doctor, can you generalize as to the reactions of parents who first learned of their daughter's situation at the complication stage?

A Frequently the initial response is one of disappointment that the adolescent did not feel able to discuss the problem with her parents. Next, many, many parents demonstrate a sense of disappointment.

But I have yet to see any parents walk out of the emergency room or the clinic and leave their child because of this.

Q Doctor, based upon your education, training, experience and studies of the literature, do you have an opinion as to whether parental involvement in a minor faced with a decision whether to continue or terminate pregnancy would be beneficial to that minor?

A Without question.

Q In your experience, do doctors bring different degrees of sensitivity and expertise to a particular surgical procedure?

A Yes, they do.

[19] MR. BEHAR: I have no further questions of this witness.

* * * * *

CROSS-EXAMINATION BY MR. LUCAS

Q What hospitals do you currently practice in in Pittsburgh?

A Mercy Hospital and St. Claire's Hospital.

Q Is Mercy Hospital a public hospital?

A No, it is not.

Q Are abortion procedures performed at all at Mercy Hospital?

A No.

Q Are elective sterilization procedures performed there?

A No.

Q Is it true that they do not even have birth control pills in the pharmacy at Mercy Hospital?

A No, that is not true.

Q Under what circumstances are birth control pills prescribed from the pharmacy there?

A The clinic pharmacy does have them for control of gynecological problems. Perhaps this is a misunderstanding. The term birth control pills is a most convenient one. But the combination of hormones is useful in many, many other instances above and beyond contraception.

Q They are never prescribed for elective contraception from the hospital clinic?

[20] A They may be if in the opinion of the physician it is in the patient's best interests that she remain anaboratory, yes.

Q To what extent have they been prescribed in the patient population in the last year?

A Fairly widely.

Q What are the background policies that control or what is the source of the policy on the abortion practice at Mercy Hospital?

A I'm sorry. I don't understand.

Q Is Mercy Hospital governed by the ethical directives of the U.S. Catholic Conference?

A Yes, it is.

Q Does the hospital receive Federal funds?

A Yes, it does.

Q Have you attended any medical or non-medical conferences on the subject of reproductive medicine in the last two or three years?

A Yes, many.

Q Could you describe which conferences you have attended?

A Primarily those of Planned Parenthood, the American College of Obstetricians and Gynecologists, both regional and national, conferences sponsored by the Family Planning Council of Southwestern Pennsylvania, now the Family Planning Council of Western Pennsylvania, of which I am a member of the Board of Directors, and meetings of the American Medical Association, meetings [21] of our Pittsburgh Obstetrical Society, meetings of the American College of Surgeons, and so forth and so on.

Q Have you attended any conferences of organizations that are opposed to elective abortion?

A That are opposed to elective abortion? Yes.

Q Could you tell me which conferences of those you have attended?

A I had been active in Pennsylvania for Human Life until about six months ago.

Q What does that organization do?

A It is involved in educating primarily and to some extent it acts as a reference source for patients who find themselves in difficult pregnancy and who are seeking alternatives to abortion.

Q Did that organization lobby against the Pennsylvania Abortion Law recently enacted last fall?

A Yes, it did.

Q Did you testify before the legislature on that statute?

A Yes, I did.

Q And in your testimony there did you express the opinion that all forms of contraception caused some sterility in the future?

A No, I did not.

Q Have you ever expressed that opinion in a public statement?

A To the best of my knowledge, I never did.

[22] Q Have you been involved at the national level in any of the Right to Life organizations?

A No.

Q Are you not a member of the National Right to Life Committee?

A No, I am not.

Q Have you given any talks at the Right to Life meetings?

A Locally in Pittsburgh, yes.

Q Any on a state-wide or national basis?

A No, none.

Q Have you written any articles on the subject of adolescent pregnancy?

A No, I have not.

Q Did you testify in court in the Pennsylvania case involving parental consent and other restrictions last fall?

A No, not to the best of my knowledge. The only hearing that I Participated in was a panel — it was the Govenor's Select Committee that I testified before.

Q Did you support the parental consent restriction in your testimony?

A Parent consent was not under consideration at that time.

Q In Pennsylvania?

A Not in my testimony or at the time of the hearing that I participated in.

Q What was the scope of your testimony?

[23] A Primarily as to the medical aspects of abortion.

Q I notice from your curriculum vitae that the first two articles you are a co-author of have to do with the rhythm method of birth control. Is that the primary method you advocate?

A No, it is one of several options we offer to our patients.

Q Do you regard that as having a high degree of accuracy?

A Statistically it is equivalent to the use of the condom.

A Or the diaphragm alone?

A Yes.

Q I notice also you have written articles on the subject of venereal disease. Have you ever treated patients with venereal disease problems who are minors?

A Many, many times.

Q Are you required to notify the parents in Pennsylvania when you do this?

A No, we are not.

Q Do you notify the parents?

A No. This is an exclusion under the Pennsylvania law.

Q Why do you not notify them, because you are not required to?

A We do so after consulting with the patient. If she wishes to, we do, and if she doesn't, we don't.

Q This is with all minors you treat for venereal disease [24] problems?

A Yes, acting under the law of the State of Pennsylvania.

Q I presume you regard these minors as capable of consenting to treatment for venereal disease?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: He may answer.

A They have been declared competent by the State of Pennsylvania and I would not question that.

Q I notice you are a member of the American College of Obstetricians and Gynecologists. Do you support their policy position on abortion?

A No, I don't. There are many who do not.

Q Under what circumstances do you think any abortion is permissible?

A I think that if it can be objectively demonstrated that the life of the mother is placed in jeopardy by continuation of the pregnancy, that that pregnancy may be terminated.

Q Have you performed any abortions under circumstances other than those you just described in the entire course of your medical career?

A I have not performed abortions under any circumstances.

Q Have you had any experience with minors who were so-called battered children?

JUDGE JULIAN: What kind of children?

[25] MR. LUCAS: Battered children.

JUDGE ALDRICH: Battered?

MR. LUCAS: Yes.

JUDGE JULIAN: What is a battered child?

MR. LUCAS: It is a common term, children abused by their parents.

JUDGE JULIAN: Assault and battery committed on them?

MR. LUCAS: Yes. It is a common syndrome. A number of books have been written on it.

JUDGE JULIAN: Do you understand the question?

THE WITNESS: Yes, I do.

JUDGE ALDRICH: Go ahead.

MR. REYNOLDS: Objection.

MR. BEHAR: Objection.

JUDGE ALDRICH: He may answer.

THE WITNESS: May I answer?

JUDGE ALDRICH: Yes.

A Yes, I have. I had the fortune of training under the physician who originally described the syndrome, Dr. Vincent Fontana, at St. Vincent's Hospital in New York.

Q Have you dealt with a large number of these cases?

A No. I don't think any single physician has.

Q Do you regard the parents of these bat ed children as competent to withhold consent for medical treatment of those minors?

MR. BEHAR: Objection.

[26] MR. REYNOLDS: Objection.

JUDGE ALDRICH: Excluded.

Q Do you regard all 17 year olds as a class as incompetent to consent to an abortion procedure?

A No. I think there are some who are mature enough to handle a decision of that sort.

Q Would you say a large proportion are capable of making such a decision?

A No. Some are.

JUDGE JULIAN: Did you say 17 or 18?

MR. LUCAS: Seventeen.

JUDGE JULIAN: Is that what you asked him?

MR. LUCAS: Yes, Your Honor.

Q Are they capable of understanding the future life consequences of the choice between having an abortion and going through pregnancy at age 17 as a class?

A Some are.

Q Are 17 year old married patients any more competent than unmarried patients or are they about the same?

A I would say they had an additional experience which has perhaps made them more competent.

Q Are there many cases where being married and under 18 would make them less competent?

JUDGE ALDRICH: I couldn't hear your question.

Q Are there many cases where being married and under 18 would make them less competent in your experience?

A I would have no basis for answering one way or the [27] other.

Q What has been your experience with reproductive health problems of married minors under age 18?

A That they tend to be no different from their older peers.

Q Do you think parental consent ought to be required for an abortion for a married minor under 18?

MR. REYNOLDS: Objection.

MR. BEHAR: Objection.

JUDGE ALDRICH: Excluded.

Q In your description of the risks in subsequent pregnancies caused by abortion were you relying on the Japanese literature?

A No.

Q Were you relying solely on the Eastern European literature?

A No.

Q What literature were you relying on?

A Reports from England, Scandanavia, Eastern Europe, which I think are more pertinent than those in Japan, and which have been limited.

Q Could you specifically identify any of those reports?

A There was a report of the Maternal Health Committee of Denmark in the early 1960's that indicated the same tendency at that time.

Q What percentage of spontaneous abortions is increased by the fact of a prior abortion according to that study?

[28] A Perhaps as much as 5%.

Q Denmark still permits elective abortion, doesn't it?

A Oh, yes.

Q Isn't it true every one of the countries you named in connection with those studies permits elective abortions?

JUDGE JULIAN: Are you talking about adolescents under age 18 or generally?

MR. LUCAS: Generally speaking.

JUDGE JULIAN: Are we concered with that? I thought the case before us dealt with adolescents under the age of 18.

MR. LUCAS: I agree that it does. I would like to ask him the specific question whether there is any difference.

THE WITNESS: May I have the question repeated, please?

Q Isn't it true that each of the countries you named, Scandanavia and the Eastern European countries, permit elective abortion at this time as a matter of their law?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: If we are going to go into these countries, are we going to stop at any particular place?

JUDGE JULIAN: I don't see the relevancy of going into adults. I thought we were dealing with adolescents, with minors under the age of 18.

[29] MR. LUCAS: The only point I was trying to make is that the testimony had suggested that complications of abortion somehow were a reason for not permitting abortion, and I wanted to point out each one of these countries permits elective abortion and that the witness knows that.

JUDGE ALDRICH: Are you going to ask the witness about abortions for minors in those countries?

MR. LUCAS: Yes, Your Honor, I am.

THE WITNESS: May I answer?

JUDGE FREEDMAN: You may.

A Yes. Indeed these countries do have policies permitting elective abortion. However, three of them have limited severely within the last three years abortions available to minors in their first pregnancy.

Q Haven't these countries done this limitation solely for population control, perhaps consistent with the political philosophy of those countries?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: I don't know how the witness can answer that.

Q Do you know what the stated governmental reason was for making those limitations on abortion?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Counsel, if you would open your mouth, please? I didn't hear any of that question.

Q Do you know what the stated governmental objection was [30] in making those restrictions on abortion?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: If they are in the reports he relied on, that is a proper question.

A They were not in the reports to the best of my knowledge.

Q Do you know what type of medical techniques were used for terminating pregnancy in the Eastern European and the Scandanavian countries that you mentioned earlier?

A In general, yes; specifically, no.

Q Isn't it true in general they did not use the vacuum technique?

A I don't know that to be true.

Q Do you know whether or not they used dilatation and curettage rather than suction?

A I don't know that to be true.

Q You don't know what type of technique they used?

A Yes. They used both methods, but what percentage of each, I don't know.

Q Do you know when the vacuum method was introduced into those countries?

A Yes.

Q What year was that?

A Approximately 20 years ago.

Q I believe you testified abortion was not a safe procedure in your opinion.

A Yes, that is true.

[31] Q Are you aware 90% of the first trimester abortions in this country are performed outside of hospitals?

A Yes, I am.

Q Are there any other major procedures you know of that are performed outside the hospital?

A No, I don't, but that does not necessarily make it safe.

Q You testified concerning what is acceptable medical practice for obtaining the minor's consent or whether or not to obtain the minor's consent is good medical practice. Aren't there many factors other than medical considerations that go into the decision to obtain parental consent?

A I am acquainted with the medical. I must admit I have no knowledge of other factors.

Q With veneral disease, don't you rely on the state law as a reason for not obtaining parental consent? Didn't you say that earlier?

A Yes. The state law enables the minor to seek treatment without parental consent.

Q If the state law enabled you to treat a minor for an abortion procedure, assuming you did them, wouldn't that be the same type of situation?

MR. BEHAR: Objection.

A No. They are two entirely different matters. It is like comparing apples and bananas.

Q Would you draw a distinction between parental involvement [32] and allowing parents to withhold consent for any reason?

MR. BEHAR: Objection as to form.

JUDGE ALDRICH: I'm sorry. May I have the question again?

MR.LUCAS: Let me rephrase the question.

Q I believe you testified earlier concerning the desirability of having parental involvement. Would you make any distinction between the desirability of having parental involvement in the abortion decision as opposed to the desirability of allowing the parents to withhold consent for any reason?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: I didn't hear the first question and I don't understand the second one.

Q With regard to abortion, you testified that it was desirable to have parental involvement in your opinion?

A Yes.

JUDGE ALDRICH: So did your witnesses. We don't have any problem there.

MR. LUCAS: That is probably the only thing both sides agree on.

Q Do you think it is desirable to allow the parents to withhold consent for any reason suitable to the parents?

MR. BEHAR: Objection.

JUDGE ALDRICH: I think that should be limited to his medical views. He is not a philosopher [33] or a legislator.

Q Do you think it is desirable to let the parents have the final decision from a medical standpoint whether the minor is going to have an abortion?

MR. BEHAR: Objection.

JUDGE ALDRICH: He may answer.

A I think that it is a matter of involving all. I can not see one group making the decision without the consent of the other.

Q How do you resolve the conflict of patient and parent when you have a minor patient?

A Well, not in this particular frame of reference, but we have had situations primarily in terms of blood transfusion, and we have had recourse to the court and requested the court to act as guardian for the minor.

Q Have you done that in instances to obtain treatment for the minor when the parents objected?

A Yes, and parenthetically, we have never been refused.

Q Do you find parents as a class have a better understanding of the abortion procedure than the minors do?

A In general, I would say yes, particularly the risks.

Q What percentage of the parents that you encounter of abortion patients or post-abortal patients — what percentage of those parents have any training in gynecology?

MR. BEHAR: Objection.

[34] JUDGE ALDRICH: I think that is getting far afield.

Q Is it a reasonable statement to say that you are actively involved in attempting to have the Supreme Court decision overturned in your lobbying efforts in opposition to abortion?

A Is it reasonable?

Q Yes. Is it?

A No, it is not.

Q Are you not involved in lobbying other than the lobbying you testified to earlier?

A No, I am not.

MR. LUCAS: No further questions.

MR. REYNOLDS: No questions.

JUDGE JULIAN: What countries do have limitations on elective abortion on minors?

THE WITNESS: Hungary, Czechoslovakia and Romania.

JUDGE JULIAN: Did they previously allow such procedures?

THE WITNESS: Yes, they did.

JUDGE JULIAN: Do you know whether these changes have come within the last three years?

THE WITNESS: Within the last few weeks.

JUDGE JULIAN: Is the source of your information with respect to those three countries official reports?

[35] THE WITNESS: No. Newspaper reports and reports in various medical journals.

JUDGE JULIAN: Reports in medical journals you have read?

THE WITNESS: Yes.

JUDGE JULIAN: Did the authorities state the reasons for the change of attitude in those three countries?

THE WITNESS: No, they didn't. They suggested but did not state it specifically.

JUDGE FREEDMAN: Doctor, I think you have answered this before, but I will put it to you anyway. Have you had specific occasions when it was your advice to parents that minors under 18 should be aborted for safety's sake?

THE WITNESS: No. We have told the parents that in our opinion and the opinion of the consultants we called upon that the continuation of the pregnancy did carry a certain risk, and it was left to the option of the minor and her parents then to make the decision.

JUDGE FREEDMAN: The occasion never arose where the pregnancy had developed to the point where you actually foresaw health factors that could create a real risk to the patient and then advised the mother or the father to consider an abortion?

THE WITNESS: No. We have not been faced with the necessity for medical reasons of advocating [36] abortion in any of these cases.

JUDGE ALDRICH: Doctor, in your opinion, when we are talking about a woman giving a valid consent, by which we mean an understanding consent, do you feel most females age 18 are capable of giving a valid consent?

THE WITNESS: Yes, sir. I think they have had sufficient experience to permit them to make a more appropriate judgment.

JUDGE ALDRICH: And you would say most of them do?

THE WITNESS: Yes.

JUDGE ALDRICH: But you would say at 17 most of them do not?

THE WITNESS: I think that there is —

JUDGE ALDRICH: In fact, that is what you did say.

THE WITNESS: Yes. I think there is a marked difference between young people in this particular age range in terms of their total experience.

JUDGE ALDRICH: Thank you.

MR. BEHAR: This witness may have to leave Massachusetts for commitments back home in Pennsylvania. Could he be excused if it is necessary for him to do so?

MR. LUCAS: No objection, Your Honor.

JUDGE ALDRICH: Yes. Thank you, Doctor.

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[37] RAYMOND C. YERKES (SWORN)
DIRECT EXAMINATION BY MR. BEHAR

Q Would you please state your name and address for the Court?

A Dr. Raymond C. Yerkes, 86 High Plain Road, Andover, Massachusetts.

Q What is your occupation?

A I am a child psychiatrist.

Q Are you licensed to practice medicine in Massachustts?

A I am.

Q What is your present position?

A My present position is Director of the Child Service at the Greater Lawrence Mental Health Center, and I am in half-time private practice.

Q How long have you been Director of the Child Service?

A I have been Director full-time of the children's services from June, 1971 until this fall and half-time from this fall until now.

Q Can you describe generally your duties and responsibilities as Director?

A Yes. Ours is a community mental health center, a first line treatment and services facility, providing services to 140,000 adults and a community of 25,000 young people. My duties encompass area-wide planning and coordination for child services of all ages, being a member of the administration of the clinic formulating policy and directing clinically my own particular unit [38] where I supervise three psychologists, three psychiatric social workers, two social work students and two guidance students in the delivery of services and, in addition, I treat children, adolescents and parents myself.

Q Could you briefly sketch for the Court your medical training?

A Yes. I graduated from Harvard Medical School in 1961 and had two years of postgraduate experience in internal medicine and pediatrics at Beth Israel Hospital, Boston.

From there I had two years of adult psychiatric training at the Massachusetts Mental Health Center, formerly the Boston Psychopathic Hospital, and two years of training in child psychiatry, working with children and parents in the Child Unit at the Massachusetts Mental Health Center.

Q In addition to your directorship of the facility in Lawrence, what other clinical experience have you had?

A I have had a rather wide range of clinical experience. From 1967 through 1971 I had a part-time or half-time private practice in Brookline. During the years 1967 to 1969

I was a staff psychiatrist and instructor at the Douglas A. Thom Clinic on Dartmouth Street in Boston, and I had a clinical instructorship in psychiatry at Boston University, and then in 1969 I was the head of one of three clinical units at the [39] James Jackson Putnam Children's Center in Roxbury, working with a wide range of minorities and a wide range of socio-economic groups.

I was also chief of community relations at the James Jackson Putnam Children's Center.

Q Doctor, I show you a three-page document. Would you identify that for the Court?

A This a a curriculum vitae I prepared myself.

MR. BEHAR: I offer this as an exhibit.

THE CLERK: Defendants' Exhibit E.

(Curriculum Vitae of Dr. Yerkes marked Defendants' Exhibit E.)

Q Doctor, have you been an active advocate of children's rights and programs and services for children and adolescents?

A This has been a primary concern of mine, particularly between the years 1968 through 1971 or 1972.

Q What was your involvement in this area?

A At that time, there were many important issues coming to bear in terms of legislation and implementation of services to children, not just mental health services, but many different orders of services to children in the Commonwealth.

I assisted in founding an advocacy organization of which I was a member of the Board of Directors for a number of years, and the particular issues that I addressed myself to and studied in depth were issues involving the new and developing concepts of special [40] education as they have now come into legislation.

Furthermore, I headed a task force regarding child neglect and child abuse to survey and support new legislation in that field.

Q You have indicated that you are a child psychiatrist. Is this a special discipline within psychiatry?

A Yes. Child psychiatry is a further discipline and a subspecialty within adult psychiatry. In my own experience, it required two more years of further training with specialization really in both adolescents and younger children. It has come to have its own professional organization, outside of the adult psychiatric organization, such as the American Academy of Child Psychiatry, and a number of others involving child service clinics.

It has tended also to be a multi-discipline field. The child psychiatrist tends to work very closely with child psychologists, psychiatric social workers and psychiatric nurses.

Q Is there any reason for that evolution of this discipline within psychiatry?

A I think a very important reason. I think that there are certain aspects of child psychiatry that are significantly different from the general field of adult psychiatry. I think the major reason is that children and young people are rapidly developing and rapidly changing individuals, and from one year to [41] another or three years later you are working with an entirely different individual.

I think the backbone of child psychiatry is understanding child development — emotional, physical and mental.

Q About how many cases of children and adolescents have you encountered in your professional career?

A Oh, doing a calculated estimate, I would say over the last seven and a half years of actual practice and four years of training, I would estimate that I have been involved in some 2,000 children, and in most cases their parents along with the

children and adolescents, and I would guess of that between the ages of 12 or 13 and 18, I would guess somewhere in the area of about 800.

JUDGE JULIAN: How many?

THE WITNESS: About 800, sir.

Q Can you generalize as to the range of problems you have encountered in the course of your professional experience in children and adolescents?

A Yes. I believe I have covered a very wide range of problems, not only in terms of psycho-pathological problems or normal development problems, but a wide range of majority and minority groups, Blacks, Spanish-speaking or whatever, and including my private practice and public work, I think I have had a fair representation of cross socio-economic problems.

[42] In addition, the work we do at our center again is a first-line service provider. Often people come directly to us, not referred.

We also work with a network of agencies in the community, children's protective services, family service agencies, our four school systems, both in consultation and work with patients, services in child placement, such as the Division of Family and Children Services at the Welfare Department, and so we work with a wide variety of organizations.

Q Doctor, do you routinely keep up with the medical literature regarding child and adolescent psychological problems?

A Yes, I do. I routinely keep up with it and I attend conferences and conventions.

Q In the course of your practice, have you encountered situations involving pregnancy?

A Yes, I have.

Q In what context have these situations arisen?

A I think that I have probably seen about as many context of pregnancy as possible in terms of being a general community type child psychiatrist. I have seen situations — very frequently the most common are pregnancies and I see the effects upon the family and the other children, and I have seen pregnancies in older married women or unmarried or divorced women which were unwanted pregnancies. I have seen unwanted [43] pregnancies in young women and in adolescents.

Q Did you have occasion to do evaluations, psychiatric evaluations under the old law in Massachusetts?

A Yes. As part of my private practice, prior to the Supreme Court decision involving abortion, on referrals from a number of gynecologists and obstetricians in the Boston area, I performed psychiatric evaluations to provide a consultation and recommendation to those gynecologists and their hospital committees, involving therapeutic interruption of pregnancy.

JUDGE ALDRICH: Are you talking simply about minors?

THE WITNESS: Both minors and mature women.

Q Can you estimate regarding the number of evaluations you did under the old law — can you estimate the percentage of cases in which you recommended abortions?

A Yes. I would estimate, and I think very accurately, it at 90% where I recommended for abortion.

Q Doctor, are there recognized psychological growth goals that take place in adolescence?

A Yes. Adolescence is a particular period of development often divided into two phases, but I think as a phase of development it is that phase which is between childhood marked often by the beginning of puberty and ending with that individual being primarily independent and on their own economically or in terms of their living arrangement, roughly I would say ages [44] 13 through 18. In this period of time there is a struggle to really actualize themselves in terms of becoming a part of the on-going adult world.

In this period it is marked by a high sensitivity to values, a highly discriminating sense of values. It is marked by contrasts. On one day the individual is showing immense maturity. One sees the child underneath with impulsive behavior or changes in terms of their managing feelings.

I think one of the primary problems in adolescence is that of learning how to make wise decisions.

JUDGE JULIAN: Learning how to do what?

THE WITNESS: How to make a wise decision, a decision involving implications of things, not just things on the face of it.

The goals of adolescents articulated by a number of people is that of becoming actually independent, actually autonomous.

Another goal is having a sense of self separate from the family, but also alongside that family.

And the final commonly termed goal of adolescents or developmental task is that of solidifying a gender identity, identity as a man or a woman.

These are processes that take a set period of time. Some emerge sooner into maturity than others. I think that young people vary widely within this period [45] of time.

Q Doctor, based upon your education, training and experience and studies of the literature, do you have an opinion as to what the impact of pregnancy is upon an adolescent given the growth goals you have described?

JUDGE ALDRICH: Adolescent what?

MR. BEHAR: I will ask it again.

JUDGE ALDRICH: I got everything except the last five words.

MR. BEHAR: Given the growth goals you have described.

A Yes. I think that pregnancy, and I am speaking of pregnancy whether in a single or married adolescent, is an immensely important happening. For an unmarried adoles-

cent living with her family, pregnancy has a degree of impact that I would term a developmental crisis. This is a developmental crisis in the middle of these on-going tasks I have described that must be accomplished for maturity in adolescents, and whether it is for better or worse, the appearance of pregnancy is a major disruption of these developmental efforts.

Q Is this a psychological crisis for an adolescent?

A This is very definitely a psychological crisis similar to other kinds of crises the adolescent experiences with one very significant difference. This is a crisis that involves the sense of femininity, the sense of growing sexuality, and I think this is what [46] makes it quite unique.

Q In your experience, are there other situations which involve adolescents in decision making within a psychological crisis context?

A Yes, there are both positive and negative, good and troublesome. For instance, an adolescent changing to another school that they like better. This is a decision which has to be made and weighed carefully. There are troublesome crises, such as dropping out of school or difficulties in flunking out of school. There are crises of death or loss of peers which has a tremendous impact on the peer group in adolescents.

There are the life crises, such as the loss of a parent which can deeply affect the adolescent.

Q Doctor, based upon your education, training and experience and studies of the medical literature, do you have an opinion as to what constitutes good medical practice and mental health practice regarding the resolution of such a psychological crisis as pregnancy?

A Yes, I do.

Q What is your opinion?

A I am of the opinion that an unwanted pregnancy occurring in an adolescent has a very strong impact on the emotional and developmental aspects of that adolescent. This

is an extremely weighty decision, one which falls upon the shoulders of a not yet fully [47] mature individual.

Q And regarding the resolution of this particular crisis, regardless of how it is resolved, what is your opinion as to what constitutes good medical practice and good mental health practice in the resolution regardless of the decision made?

A I think the professional has a very important role here. The adolescent who is pregnant tends to be quite frightened and scared and feels impelled for an immediate solution to the problem. I think the professional has the responsibility to first have an open mind about this matter and say that there are many options to this situation and to carefully and deliberately set the stage for the individual who is pregnant and those important people around that person with all due deliberation to arrive at a solution which is fit with their particular situation.

One must, as a professional, tread the fine line of just being pushed along by the tide of feeling for an impulsive solution versus dragging one's feet and dragging it out so long that it makes things difficult.

I would say that no less than a week of deliberation on this in a very intensive way is necessary and the result should be that that individual ends up feeling that they have made the best possible decision of decisions and that they have done their best no matter what.

[48] JUDGE FREEDMAN: Do you mean by that if a week goes by and a decision has not been reached as to what to do with this unwanted pregnancy, it could create psychological havoc with the patient?

THE WITNESS: Well, I think I choose the week not so much out of a psychological time frame, but often the situation is that it is nearing the third month of pregnancy. I would say that at a minimum something like a week should be

taken. I don't feel that an overnight decision or over a couple of days allows them to sort out the feeling or the feeling-dust to settle around the decision.

There is often very much trouble during this time, a lot of strife and concern. Strife and concern does not mean that the individual is badly off. It may mean that they are getting these things worked out so that they are sitting on a lot of feelings later that they have just pushed down in a kind of impulsive situation.

JUDGE FREEDMAN: Your concerns are related to the psychological development?

THE WITNESS: Yes, very definitely the psychological development, the psychological resolution of these issues.

Q Doctor, you mentioned that people are important to the adolescent. What did you have in mind there?

A The adolescent depending upon age lives in two [49] worlds. One is a world of peers and one is a world of family. In terms of emotionally important people, the family are the oldest. They know the individual the best. They are the people I think should be primarily involved, if at all possible. I feel that the family involvement should be the rule for several reasons.

Q What are those reasons?

A The first reason is that an unwanted pregnancy involves an emotional crisis of at least a month to six weeks duration. There is a waiting decision to be made by the adolescent. Though the adolescent in certain ways may be clear upon what decision would be best for her, I think that on the one hand it puts an undue emotional strain, the strain of responsibility upon that individual to make a decision alone. I think having the family involved and the family and that individual working through a decision together that the teenager feels as though they have support in their decision, and that they have come and arrived at the best decision possible.

I think that without the family being involved, the family is not prepared to support that individual through the crisis of three to six weeks following a therapeutic interruption of pregnancy, and there is the most important matter of making one's peace with the decision that has been made.

[50] I have had certain experience, a couple of cases of the family finding out later and feelings coming out, "Well, you made that decision. You live with it."

Where you have the family making the decision, everyone is committed to carrying out that decision ultimately.

Q Are you saying that one has to take a long-term view?

A I think one has to very importantly take a long-term view. Often what I hear are short-term views, but the long-term view is that of helping this individual come out of a crisis with a minimum amount of impairment emotionally in terms of any subsequent pregnancies at a later time when she is prepared to have babies.

Q Doctor, based upon your education, training, experience and your studies of the medical literature, do you have an opinion what constitutes an informed consent to a procedure such as abortion?

A For an adolescent?

Q For an adolescent under 18. Do you have an opinion?

A I have an opinion.

Q What is that opinion?

A That opinion is that the informed consent must not only entail an understanding technically of the procedure and technically of the risks and physical complications, but it must entail a capability of life experience sufficient to grasp the implications of such [51] a procedure, particularly in regard to the emotional implications — that the feelings involved with terminating a pregnancy do not end with the termination of the pregnancy but go on after a period of time, and these must be faced and dealt with.

Q Doctor, based upon your education, training, experience and studies of the literature, do you have an opinion as to whether there is a correlation between the age of an adolescent and the ability of that adolescent to give an informed consent as described?

A Yes, I do.

Q What is that opinion?

A As one sees increasing maturity during the phase of adolescence, I think that what I have seen is the 13 to 15 year age group tend to not want to be primary in the decision making. They would rather have a decision made for them. I think in that group one has to work to help the child participate in the decision making and not just leave it up to the parents.

In the 16 to 18 year group, I have the feeling that they would like to have greater input into the decision making, but I think they have difficulty, with individual exceptions obviously, but as a rule and as a class I think that they have difficulty in both arriving at the final decision and carrying it through with an understanding of all the implications.

Q Doctor, based upon your education, training, experience [52] and studies of the medical literature, do you have an opinion whether 16 year olds as a class can give an informed consent to a procedure such as abortion within your definition?

A Within my definition of understanding the facts and being able to understand the implications as a rule and as a class I do not think the 16 and 17 year old group are capable of giving an informed consent.

Q Do you recognize exceptions to that?

A Yes.

JUDGE ALDRICH: Do you draw a marked distinction with age 18?

THE WITNESS: I think age 18 is partly a societal mile post in certain ways. That is the age at which the kids are

graduating from high school and go to college, and that is the age that the kids not going to college often move out into their own apartments. It is the difference between contemplating all these responsibilities and suddenly arriving, that they are there and they are responsible for their own lives, and I think this puts a different perspective on things.

One sees this in the last four months of the senior year treating high school seniors. There is an anxiety that they go through in facing that mile post.

Q Doctor, in your experience have you found reluctance [53] in adolescents under 18 to involve their parents in psychological crisis situations?

A Yes. I think it varies. Again, it is individual. The reluctance that I often see in adolescents having some sort of crisis, especially if it is something where they are worried about trouble, there is the tendency to overestimate the response on the part of the parents to their crisis.

My common experience is that in the very serious situations, for example, an unwanted pregnancy, that very often after a bit of flack the families come through and say, "Hey, let's help. Let's do it all together."

Q So your experience has been also in situations where the parents have been notified?

A Yes. Well, in most situations I am notified. In fact, I don't know of any that I haven't. Yes, the parents come through and I think it is an important thing on their part in relationship to their child.

MR. BEHAR: I have no further questions of this witness.

JUDGE FREEDMAN: Are you saying, Doctor, by your last statement that you have only dealt with adolescents where the parents have been notified of the problem of the unwanted pregnancy?

THE WITNESS: Yes, partly out of a personal policy of mine.

[54] JUDGE FREEDMAN: You have never dealt with the adolescent as a patient by herself?

THE WITNESS: In terms of any therapeutic interruption of pregnancy. In terms of other situations, such as treatment at our center, we may with the over 16 law deal with an adolescent individually without the family for an evaluative period. However, after a period of evaluation, we ordinarily insist, even if the family will not participate, that they know and support the treatment of that individual at our center.

MR. REYNOLDS: I have no questions.

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CROSS-EXAMINATION BY MR. LUCAS

Q Is there any form of certification in the psychiatric field for dealing with adolescent pregnancy? I notice that you are certified in adult psychiatry.

A Yes. General psychiatry is the accurate term. The certification in psychiatry is of two kinds. The first is general psychiatry, and as child psychiatry evolved there was a separate sub-specialty in terms of child psychiatry. I am certified in general psychiatry. I am board qualified in child psychiatry. It is a matter of taking the examinations.

Q Do you have to still take both written and oral examinations to obtain that certification?

A Yes, you do. However, may I say it is not uncommon for a child psychiatrist not to be certified. It is not like a licensure or a bar exam. It has nothing to do with that.

Q Did I correctly understand that you in your clinical experience have dealt with approximately 800 patients under age 18?

A Yes.

Q Approximately how many of those patients were pregnant?

A I would say directly and supervisorily it would run in the range of two dozen to 30 personally. One experience I have had is three in-depth studied cases in on-going treatment who during the course of treatment experienced a pregnancy.

Q Do you know how many minors under age 18 were pregnant during the past year in Massachusetts?

A Would you repeat that?

Q Do you know how many pregnant minors there were in Massachusetts under age 18 in the past year?

A I have an impression, but I have no direct knowledge.

Q What range would be your estimate? Do you have an estimate?

MR. BEHAR: I object.

JUDGE ALDRICH: The matter will be material at some point. But if the witness does not know, he certainly doesn't have to guess.

A I know it is increasing, but that is the only impression that I have.

Q Over how many years was your experience with these 800 [56] patients under age 18?

A Well, beginning in my training, I began my adolescent experience on the in-patient service during my adult training and continued many of the cases. I have one adolescent case that I have treated off and on for the last eight years. I would say probably over 12 years.

Q And these 30 pregnancy cases that you dealt with, were these also spread out over that 12-year period?

A Yes, they were.

Q So this would be about one every two years?

A Well, it might be an average, but it does not describe the distribution. I would say that most have been over the last four years.

Q Have you written any articles at all on the subject of adolescent pregnancy?

A No, I have not.

Q Have you conducted any formal studies of adolescent pregnancy?

A No, I have not.

Q Are the types of services that you offer available to all minors in the Commonwealth of Massachusetts?

A Would you repeat that?

Q Are the types of services that you offer available to all minors in the Commonwealth of Massachusetts or do you see them as private patients primarily?

A Do you mean my private practice and clinical practice are particularly in the mental health region? I don't understand.

[57] Q Based upon your experience in this State, to what extent is psychiatric treatment or psychiatric consultation available for pregnant minors in the Commonwealth?

A They are available in our area, I can tell you, both privately and in the clinic.

Q Are they readily available for all minors in the Commonwealth?

A I don't think I am qualified to answer that.

Q Are you a member of the American Psychiatric Association?

A Yes, I am.

Q Do they have a position on adolescent pregnancy?

A They have a position on pregnancy.

Q What is their position on abortion?

A Let's see. It was last spring or summer when I read it. I could only summarize, but it is generally that it is a situation of decision making between patient and doctor.

Q They do not include parents in that statement, do they?

MR. BEHAR: Objection.

JUDGE ALDRICH: He may answer if he knows. He is a member of the Society.

A I don't know. However, I do know that the American Psychiatric Association primarily addresses itself to adult psychiatry.

Q Have they addressed themselves to the problem of [58] adolescent pregnancy at all?

A I read the statement thoroughly and I don't know whether they do. My impression is that they do not.

Q Do you find that minors at a given age vary widely in degrees of maturity?

JUDGE ALDRICH: Would you speak up?

Q Do you find that minors at a given age vary widely in degrees of maturity?

A By minors, do you mean adolescent minors?

Q Yes, under 18.

A Yes, and they tend to vary from day to day, too, in terms of the level of maturity they are operating on.

Q As a class, do you regard married minors as any more competent emotionally than unmarried minors capable of giving an informed consent?

A In that marriage and the way most families deal with married minors, they have the responsibility on their shoulders, and I think they tend to rise to the occasion and can give an informed consent probably more often, but I don't think that one could make that a rule in each case.

Q Do you think unmarried minors rise to the responsibility when they become pregnant of making their life decisions?

A Some of them.

Q Do you think minors under age 18 as a class are capable of giving an informed consent for the treatment of [59] V.D.?

A Yes, I would say so. I think it is a different matter. It is a different problem from pregnancy.

Q In what way is V.D. a different problem from pregnancy?

A I don't know of veneral disease as being a normal psycho-sexual development in pregnancy.

Q Isn't it a frequent part of the psycho-sexual development?

A Not in the terms of the way the psycho-sexual development is a frequent happening in sexual relations. It is not a counterpart psychologically in normal development.

Q Have you had the occasion to be consulted by any pregnant minors since last November?

A No.

Q Have you ever had a case of a pregnant minor who was discussing the subject of abortion with you who objected to your notifying her parents?

A I think we have to consider the two roles I operate in:

(1) One role was as a therapist and in an on-going treatment situation where an individual became pregnant;

(2) And another role is having to sit in judgment as to whether under the old law, whether an individual should have therapeutic interruption of pregnancy.

Those two roles don't mix. In the first role, as a therapist, it was more in an advise-and- [60] consent role; and in each and every case, working the matter through, the adolescents themselves consulted the parents. They were worried about it and they thought terrible things would happen, and in all cases terrible things didn't happen. The parents were supportive.

In the other role of making a decision in regard to pregnancy and the interruption of a pregnancy, under the old system prior to this Supreme Court decision, it was required that the parents were involved before they came to me.

Q Of the 30 pregnant adolescents that you had seen, how many of those have you seen since the Supreme Court decision on abortion?

A I have seen one subsequent who came to me subsequent to the abortion.

I have not seen or supervised, I don't believe, any since November.

Q How many have you seen since January of '73?

A January of '73?

Q Is that the date you meant?

A Yes. I would guess probably a dozen or 14.

Q How many of those were seeking, were considering the option of an abortion?

A I would consider — I would guess probably half, somewhere in there. These are fine statistics that I would be afraid I would have to sit down and really calculate up.

[61] Q How do those patients get to you in the first place?

A In terms of most of the experience since '73, it has been through my clinical work since I was fulltime, and on referral from the local drug council, which does a lot of work with teenagers other than with drugs, school guidance counselors and on certain occasions from the families themselves.

Q Of the ones that you have seen since January, '73, I believe you thought you had seen about 14 and about half of those were considering an abortion.

A Yes.

Q What was the outcome of the pregnancies of those half?

A I think about half — maybe 40% of them obtained abortions and we followed through with services subsequent to the abortion.

Q Do you know what became of the other 60%?

A I would say in terms of our follow-up people sticking with us, I would say the other 60% probably had their babies. I think in two cases there was a spontaneous abortion. And the most, there were some married and some — one or two gave up the infant, and I think two of them stayed with their families and bringing up their child.

Q Do you think that 17 year olds as a class are capable of understanding the impact on their future of continuing pregnancy?

A I think they have limitations there, too, and I think [62] they need help in making decisions about having an abortion; they need more help in considering the implications for the future. I think I have seen —

JUDGE ALDRICH: Need more help for which, continuing the pregnancy or abortion?

THE WITNESS: More help in terms of pregnancy, if they are going to keep the child, because it involves an on-going strain of raising that infant.

Q Do you say that continuing the pregnancy is more of a disruption of their life than obtaining an abortion?

A No, I did not. I said that they need more help because there is not an infant that's a product of an abortion, and there is in a term pregnancy.

Q Do you think that in that case, the case of continuing the pregnancy, is, generally speaking, more of a disruption of a minor's life than obtaining an abortion?

A I don't think I could answer that on the basis of what do you mean by "disruption"? Whether emotional disruption or literal disruption — taking out nine months or sometimes having a problem with education and all the other things that come up.

Q Well, it is a disruption in some ways that an abortion is not?

A In terms of time and energy consummed, yes.

Q In terms of emotional impact on the minor in the future?

A I think that is purely individual. I think there are some minors who would be much more disrupted by an [63] abortion and others more disrupted by a pregnancy, and I think it depends upon their condition in the situation largely.

Q Do you think the ability of the 17 year old to give an informed consent to an abortion is purely an individual matter?

A I don't know what you are asking. Are you speaking of a class or —

Q Well, I am asking if the question of whether a minor is competent, whether a minor under 18 is competent to consent to an abortion, whether that is an individual question that varies from minor to minor?

A Yes, they are all individual questions; but I think there are generalizations that can be made around the class.

Q Do you think as many as 40% of 17 year olds are capable of giving an informed consent to an abortion?

A I don't think I am qualified to say on that. I would say some are and the majority are not, and I think it would take some study to do that.

Q How large would you think that majority is?

MR. REYNOLDS: I object to that, if Your Honor please.

JUDGE ALDRICH: He doesn't know, so I don't know why we are going to guess.

Q Do you think it sound medical practice to require the consent of both parents invariably with the minor under [64] 18 seeking an abortion?

A I think as a rule and as a precedent to be striven for, yes.

Q Do you require the consent regardless of the reasons the parents give for it?

JUDGE ALDRICH: Regardless of the reasons that the parents give for withholding the consent?

MR. REYNOLDS: I object to that, if Your Honor please.

JUDGE ALDRICH: I don't think he can answer that. If he can, I would like to hear it.

THE WITNESS: There are other remedies to the situation. I think as a general rule that the requirement of both parents consenting is a sound one in terms of a mental health practice of getting everybody involved to have a bit of the action and the responsibility to commit themselves right from the start.

JUDGE ALDRICH: I think that is a responsive answer.

Q Do you ever encounter instances where the parent — one parent at least — refuses to consent to an abortion?

A Yes, as I have encountered instances in terms of surgery when I was in pediatrics or in blood transfusions.

Q And what reasons do the parents give for refusing consent in such cases?

A Very often it is a value judgment that they do not feel an abortion is morally right. Very often in the [65] situation in the individual raised in that family, even though there may be differing in certain ways, she has that also in her value system.

Q Are there any other reasons that a parent gives for withholding consent?

A I would say that there are certain reasons involving physical health or concerns about emotional health.

Q What percentage of parents in those cases are gynecologists or psychiatrists?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Excluded.

Q Do you think that emotional support can be provided for a pregnant minor without requiring parental consent?

A Yes.

Q Under what circumstances do you recommend an abortion for a person under 18 from an emotional standpoint?

A Well, these days I don't have to recommend; that's a gynecological decision and I am sometimes in the position of consulting and I try to elicit as thoroughly as possible the

feelings about all alternatives, the feelings of the child toward the pregnancy and thoughts of the infant, and try to help them to come to some resolute decision involving it.

JUDGE ALDRICH: Do you mean by that answer, Doctor, you don't recommend either way?

THE WITNESS: Don't recommend?

[66] JUDGE ALDRICH: Either way. He asked you —

THE WITNESS: Yes, as a rule, when I am consulted at this point, where psychiatric consultation is not part of the decision making, I usually do not take a stance with the patient. I may firm up a stance that they have worked through and say, "Well, that seems to make sense to me"; but I do not take a stance with the patient.

JUDGE FREEDMAN: I thought you answered in direct examination in a question from Mr. Behar that in 90% of the cases psychologically evaluated —

THE WITNESS: Both —

JUDGE FREEDMAN: Both minors and majors, in 90% of those cases, you recommend an abortion. Did you say that?

THE WITNESS: Yes.

I try to keep sorted out my role as a decision maker under the old statute prior to the Supreme Court decision regarding abortion. In that case, one of my roles was to operate giving a recommendation to a gynecologist and a hospital committee. In those cases, where I had to sit in judgment in essence on whether an abortion should be recommended as a medical and psychiatric decision, yes, I did recommend 90% of the cases for therapeutic interruption of pregnancy.

However, since the liberalization of the abortion statutes, my role has not had to be involved [67] in making medical recommendations, but more as working along with the gynecologist or working along with the family and the patients to help them carry out what was best for them.

JUDGE FREEDMAN: In your history of having dealt with two dozen or 30 patients who were adolescents —

THE WITNESS: Yes.

JUDGE FREEDMAN: — did you, as a result of your evaluation psychologically establish a position where you then recommended an abortion in any of those cases?

THE WITNESS: Those in the last four — well, last three years actually — those have been primarily clinical cases. And we again took a therapeutic stance of having or helping the family to come to some resolution. We felt our role was helping them resolve rather than taking an authoritative position or authoritarian position. And as they did all different things, they made different decisions.

Q Do you regard gynecologists as capable of assuming this recommending role?

A In what context?

Q In the context that they are in fact doing it now. Do you feel gynecologists are capable and competent?

A On a medical basis or a medical — psychological —

MR. REYNOLDS: I object.

JUDGE ALDRICH: I will exclude that question. [68] It assumes something and we don't know what it is.

Q You did testify gynecologists were assuming the recommending role which had previously been assumed by psychiatrists for abortions, did you not?

MR. BEHAR: Objection.

JUDGE ALDRICH: I don't myself remember that testimony.

Did you so testify, Doctor?

THE WITNESS: Not to my recall. I may have said —

JUDGE ALDRICH: Well, let's start over again. What is the role of the gynecologist? That's my question.

THE WITNESS: Yes, I didn't know whether you were talking to me.

JUDGE ALDRICH: I was asking you.

THE WITNESS: Well, what is the role of the gynecologist?

JUDGE ALDRICH: Yes.

THE WITNESS: The gynecologist is the individual who has to perform the procedure if the decision is made. Now, I am not a gynecologist. However, I think a comparable medical situation is that a gynecologist has the same responsibility to ensure that there is sensible deliberation on this matter of the patient and the family. And I think in certain cases I would go to general medical ethics that if there were differences [69] between the patient — that is the adolescent patient and her family — that the gynecologist might weigh in the decision and might attempt to either persuade the family or to disuade a patient if he felt there were a medical indication for it.

But I think they should help them make the decision the best that they can.

Q And in what percentage of cases of a large cross segment of pregnant minors under 18 do you think that an abortion is the better and preferred course?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: I don't know if he can answer that question.

THE WITNESS: I can't.

JUDGE ALDRICH: I wouldn't think so.

Q Do you think it depends upon the individual circumstances of the patient?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: You may answer that.

A I think it depends upon the individual circumstances of the patient and the family and the particular situation in life.

Q I believe you testified earlier that you thought one week of deliberation was necessary for a patient seeking an abortion. Is that correct?

A Well, considering making it in my experience and [70] again, as I have said, at that time, that's not a psychologically determined time frame. In my experience, the matter of one getting together and talking and deliberating on this, that is usually takes about a week to come to some sort of resolution. It is a product of my experience and not any theoretical time frame.

Q Do you think this week ought to take place after a pregnancy is definitely diagnosed?

A It would be hard before. You mean before — when there is a concern about whether the girl is pregnant or not?

JUDGE ALDRICH: Well, what about consent before a girl is pregnant?

THE WITNESS: Where she has missed a period and —

JUDGE ALDRICH: Let's assume she is still chaste — that's an old-fashioned word.

THE WITNESS: Yes, I know it. I assume it is her missing a period which is getting the cause — yes, I think that part of that could be worked through beforehand, but I think when the facts come in, there is very different treatment of the issue by the individual and by her family.

MR. LUCAS: I don't think I have any further questions.

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[71] RE-DIRECT EXAMINATION BY MR. BEHAR

Q I just have one on re-direct. You indicated that in some situations emotional support can be available to an adolescent besides her parents. What sources of support did you have in mind?

A I think that in my thinking, I think in really a sub-class of adolescents, which I think is a minority — the major class, I believe, are adolescents who are more or less functioning in intact families — I think there is a sub-class of teenagers for whom the families either are not filling their role or for whom they already left their families. And I think in this situation medical and mental health professionals have a certain responsibility to perform an emotionally supportive role.

I think, also, in certain cases such as the courts may come into this situation is where there is a disagreement between the child and the parent, and the child is really bearing their responsibility rather well, to utilize court sources.

Q So you are saying they need a responsible adult?

A Not solely because individuals can't make up their mind, but give them company in that very lonely decision-making time and to follow through with them in support until they are over this crisis, yes.

MR. BEHAR: I have no further questions.

JUDGE ALDRICH: Perhaps you have already [72] answered this in the last minute or so, but you testified about the strain that's on the child that has to make a decision alone. And then you spoke later about the child who had parents who regarded abortion to be morally impermissible under any circumstances.

THE WITNESS: Yes.

JUDGE ALDRICH: And, obviously, there are such people with great sincerity. What is the strain that's on the child who has those parents?

THE WITNESS: The parents who feel that abortion is both emotionally and ethically abhorrent?

JUDGE ALDRICH: Not morally permissible.

THE WITNESS: I think a dual strain, one strain may be her own personally felt beliefs, but also —

JUDGE ALDRICH: I would like to assume she didn't have such beliefs, because that's, I would guess, possible, in fact very possible.

THE WITNESS: That she believes differently than her parents?

JUDGE ALDRICH: Yes.

THE WITNESS: Okay. She believes differently than her parents. Very often this sets up an internal conflict with the early childhood conscience being programmed for abhorrent feelings about abortion.

JUDGE ALDRICH: No doubt a great guilt feeling on herself?

[73] THE WITNESS: Yes, and I think — and I don't want to get into conscious and unconscious issues — but I think that even though her manifest belief in adolescence, and it may be an illogical one or thought through belief — may be that the young woman should have an abortion available. I think there is a potential for unconscious guilt here, Your Honor, which is much stronger, say, in a child who grows up in a family that always felt this.

JUDGE ALDRICH: What is the solution for that?

THE WITNESS: I don't think there is a solution, but I think that professionally we can ensure a better working through of those feelings at the time.

JUDGE ALDRICH: With the parent?

THE WITNESS: With the parent or individually with the child.

I am thinking of one individual in particular who it happened with who had a very strong post-abortion reaction for which I treated her, who ended up saying, "You know, I just feel bad and I don't know why. But I know I did the right thing."

So that she was equally as resolved about the decision but still she, I think, had a lot of feelings about it more than another person might.

JUDGE ALDRICH: Thank you.

Do you have any more witnesses, Mr. Behar?

MR. BEHAR: Could we take the morning recess? [74] I want to make a decision as to that.

JUDGE ALDRICH: Yes, surely, not very long.

(Morning recess)

MR. BEHAR: The defendants would have no further evidence to present.

JUDGE ALDRICH: Well, we will be glad to hear arguments.

MR. REYNOLDS: I think my brother was speaking for himself. I have one short witness, if I may.

MR. LUCAS: This is the first we have heard of any further witness, and we have been repeatedly inquiring about witnesses. We would object to any witness we have no notice of.

We don't know the witness' identification —

MR. REYNOLDS: I didn't know any inquiry was made.

MR. RILEY: Your Honor, a telephone inquiry was made about any expert witnesses that were going to be called and actually it was a request for a curriculum vitae of any expert witness that would be called. We are not going to call an expert witness. We are calling one of the parent intervenors in the case.

JUDGE ALDRICH: What is the purpose of this testimony? What do you propose to show?

MR. REYNOLDS: I have a witness today, one of the parent intervenors, who is the parent of a [75] teenage child, unmarried, of childbearing age, and I want to have her testify as to the reasons that she would support the unholding of the statute in question.

MR. LUCAS: We will withdraw our objection. I thought it was an expert witness.

JUDGE ALDRICH: All right, proceed.

MR. REYNOLDS: Thank you very much. I would like to call Mrs. Hunerwadel.

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JEAN HUNERWADEL (SWORN)
DIRECT EXAMINATION BY MR. REYNOLDS

Q Will you give us your full name, please?

A My name is Jean Hunerwadel.

Q Now, where do you live, Mrs. Hunerwadel?

A 121 Gardner Street, Hingham.

Q You are married, are you?

A Yes.

Q What is your husband's name?

A His name is Jean L.

Q And you have children, do you?

A Yes, we do.

Q May we have their ages?

A Thirteen, 12 and 9 years.

Q With regard to yourself, Mrs. Hunerwadel, will you tell us what your education is?

A I have a B.S. degree in early childhood education and child development from St. Joseph's College in West Hartford, Connecticut.

Q When did you recieve that?

A 1953.

Q Since that time, outside of the home, what has been your work experience, if any?

A I worked four years at the James Jackson Putnam Children's Center Clinic for emotionally disturbed pre-school children and then, following that, I worked one year as kindergarten teacher at Shady Hill School in Cambridge. I was married following that and then did not work outside the home again until 1970 when I was director of St. John's Community Nursery School in Hingham for two years.

Q Are you affiliated with any of the Pro Life organizations?

A Yes, I am. I am an incorporating member of the Birth Right of South Shore in which I am no longer active, and I am subscribing member to the Massachusetts Citizens For Life from which I receive a news letter once a month.

Q Mrs. Hunerwadel, do you have any personal views on the subject of abortion?

Q Yes, I do.

Q Will you be good enough to tell us what that view is?

A We would regard abortion to be the least desirable alternative to an unplanned pregnancy.

Q Are you familiar with the provisions of Chapter 112, § 12P?

[77] A Yes, I am, generally familiar.

Q Now, I ask you this, Mrs. Hunerwadel, are there circumstances in which you would consent to an abortion to be performed on one of your daughters were she to be found to be pregnant, unmarried and under age 18?

A Yes, there are.

Q Tell us what those circumstances would be.

A We would like to understand the circumstances which led to her pregnancy, the circumstances in her life. We would like to know about the boy by whom she became pregnant, about her feelings about the pregnancy, her feelings about the baby, her feelings about the boy who would be the father of the child. We would like to be able to make avail-

able to her our support and our interest and our care as we have from the time that we have known she was coming to us.

We would like to be sure that she has available all of the alternatives that are available to her and all of the resources in the community, and we would like the opportunity to have her know that we will continue to support her, and if she should decide, in spite of what we were able to show to her in terms of alternatives and support and how we felt, that she just must have an abortion, we would consent to that; but that would not be the end of our involvement.

We would also want to be sure that she had a gynecologist-obstetrician whom we felt was professionally [78] skilled, and beyond that, who had the qualities of interest and sensitivity and humanitarianism which we regard to be important in physicians; and we would also want to be sure that the facility that was chosen in which the abortion were to be done was one which had adequate services all around, because we do not regard the situation of unplanned pregnancy to be a separate situation which is begun, ended and then is out of the youngster's life.

We feel that the youngster, as everybody does, brings feelings of circumstances into the situation and that also circumstances and feelings continue after, whether it is a completed pregnancy or an abortion.

And we would foresee needing follow-up care for this youngster, psychiatrically, probably, at some time if not immediately.

So those kinds of decisions would be very important to us to help her to make.

Q Mrs. Hunerwadel, you are yourself, of course, a former teenager and you have teenage children. In your view, do you consider that young woman under the age of 18 are capable of informed consent with regard to the option of an abortion?

JUDGE ALDRICH: It seems to me we weren't going to have any expert opinion.

MR. REYNOLDS: I wasn't considering it from the standpoint of an expert.

[79] JUDGE ALDRICH: How are we going to be affected by one lady — surely sincere and truthful — but we might as well have one hundred thousand ladies and get their views, if this is your idea of trying the case.

MR. REYNOLDS: Then I would not press the question, Your Honor.

Thank you, Mrs. Hunerwadel.

MR. LUCAS: Could we put cross-examination off to the afternoon session and give me an opportunity to consult?

JUDGE ALDRICH: The fact of the matter is we were going to ask for oral argument forthwith.

MR. LUCAS: We would like to request the Court to have cross-examination. — I think it would be very brief — immediately after lunch.

JUDGE ALDRICH: Well, I suppose we can go to lunch early.

How long is your oral argument going to take?

MR. LUCAS: Approximately 40 minutes would be adequate.

JUDGE FREEDMAN: You don't have any rebuttal witnesses, do you?

MR. LUCAS: No, Your Honor.

JUDGE ALDRICH: Do you plan to file a brief?

MR. LUCAS: We decided not to file a further brief beyond the memorandum and authorities we have [80] submitted.

We have an additional decision from the Supreme Court of the State of Washington, and I have provided counsel from the other side with it.

JUDGE ALDRICH: Very well, you can give that to the Clerk.

How about the argument by you other gentlemen?

MR. BEHAR: I would estimate 20 minutes. I think we have said it in our brief.

MR. REYNOLDS: Mr. Riley, with the Court's permission, is going to give our argument.

JUDGE FREEDMAN: How long do you estimate?

MR. RILEY: Fifteen to 20 minutes, Your Honor.

JUDGE ALDRICH: We can take a recess until 1:30.

(Recess.)

• • • • •

(AFTERNOON SESSION:)
(1:30 P.M.)

MR. REYNOLDS: I don't know whether Mr. Lucas has decided to cross-examine my witness or not.

MR. LUCAS: Yes, we are ready to go forward with cross-examination.

• • • • •

CROSS-EXAMINATION BY MR. LUCAS

Q Mrs. Hunerwadel, what is your middle name?

A My middle name?

Q Yes.

A Well, my middle name is Jane if you call me Mary Jane, or my middle name is Maroney if you call me Mary Jane Maroney, or if you call me Jane Maroney Hunerwadel. I sign it both ways.

Q I noticed on the Complaint filed by the intervenors your name is mispelled as was that of four other plaintiffs. Had you ever met with counsel in this case before the lawsuit was filed?

A Before the lawsuit was filed?

Q Before the lawsuit on behalf of you and the other intervenors?

A I had talked with counsel. How is my name spelled?

Q It has a "d" in it.

A Yes, it does have a "d" in it.

Q It does have a "d" in it?

A That is appropriate.

[82] Q I see.

A As long as it is in the right place.

Q There was a letter to the Court changing the spelling of it.

JUDGE FREEDMAN: Has it been corrected?

MR. LUCAS: It seems to be corrected on the face of the Complaint, but the letter of January 23 to the Court is attempting to change it to an incorrect spelling along with that of four others.

Q When did you first hear about this lawsuit, that it was pending?

A It is hard for me to remember just exactly when. I can't remember whether I learned of it in the newspaper or in discussion with friends.

Q Was there a meeting held among the memebers of the Massachusetts Citizens Concerned for Life shortly thereafter?

A No, not that I know of. I do not attend the meetings of the Massachusetts Citizens Concerned For Life.

Q Are you familiar with the statement of the President of that organization that they were financing this lawsuit?

A No, I am not.

Q Are they, in fact, financing the lawsuit on behalf of the intervenors?

MR. BEHAR: I object.

[83] JUDGE ALDRICH: What is the objection?

MR. BEHAR: I don't think it is relevant.

JUDGE ALDRICH: I haven't quite followed the drift of this argument, but it seems to me he has been suggesting she is not a proper plaintiff. Otherwise, I don't see any point to it.

MR. LUCAS: I am just trying to ascertain whether or not they have standing. Certainly this question has been gone into with regard to Parents Aid Society. I want to ask a few simple questions about the Massachusetts Citizens Concerned For Life.

JUDGE ALDRICH: I notice in the briefs filed with us today by your brethren that there is no longer any attack made upon the standing plaintiffs. Have you abandoned that attack?

MR. BEHAR: I believe in the introduction to our brief we say that we incorporate the memorandum previously filed and not to repeat arguments we would rely on the previously filed memorandum.

JUDGE ALDRICH: All right. So you do still attack the standing?

MR. BEHAR: Yes.

JUDGE ALDRICH: Of every one of the plaintiffs?

MR. BEHAR: That is correct.

JUDGE ALDRICH: Well, then is it not appropriate to discuss the standing of this witness or this plaintiff?

[84] MR. BEHAR: I don't see how the financing of the case relates to the standing of this individual.

JUDGE ALDRICH: It might show what her interest was.

MR. LUCAS: Do we still have a question before the witness?

JUDGE ALDRICH: Yes.

Q Do you know who is financing the lawsuit on behalf of the intervenors?

A No, I don't. I made a small contribution myself.

Q Do you know where the large contributions are coming from?

A No, I don't.

Q One of the issues in the case has to do with the standing of the parties and I have to ask you some questions that I would rather not ask. But do you have any reason to believe that any of your daughters might be in need of abortion services?

A At this particular moment, I hope not but I have no way of knowing.

Q Are you speculating about any future possibility that they might have any need?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: I may be illuminated in due course, but I don't see the objection to plaintiffs' standing or the objection to this lady's standing.

[85] MR. REYNOLDS: Very well, Your Honor.

Q In what way do you think this law may affect you?

A I think that in the event my child, my daughter might become pregnant and might decide to get an abortion without letting us know, that this would be a direct intervention in our communication as a family, parents and child, and we would not want to see her carry this burden of making this decision by herself, and the burden of secrecy which she would carry afterwards in order to keep it from us.

We feel it is very divisive. I was frankly quite outraged by the possibility of parents' consent not being required.

Q Are your views shared by your husband?

A Yes.

Q Do your daughters have any views on reproductive freedom?

MR. REYNOLDS: I object to that question, if your Honor please.

Q Or on the subject of abortion?

MR. LUCAS: I will withdraw that and ask this question.

JUDGE ALDRICH: Very well.

Q Do your daughters have any view on the subject of abortion, as far as you know?

A I don't think they have any definitive one-sided views, no.

Q Have they been exposed to the birth right and right to [86] life viewpoints on the subject of abortion by you?

A They have been subjected to our values and our views, yes. They understand that the unborn child is alive and is a human growing in the womb and that the undeveloped unborn child is a human being. These are what we felt were the positive things and important things to teach them.

Q Are these views you have inculcated in them as part of the family education?

A I would say this is part of our life, yes.

Q Have they had any sex education in your schools?

A Not in the public school, no.

Q Have you been active in opposing sex education in the schools?

A I have been active in opposing certain portions of sex education, yes.

Q What types of sex education have you opposed?

A The discussion of values as to sexual action and freedom as it would pertain to adolescents.

Q Do you oppose the discussion of both sides of the different types of values?

A I feel that the school is not a place for a debate forum on values.

Q What do you think should be encompassed in sex education in the schools?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: No.

[87] MR. LUCAS: I am just trying to get at the bias of the witness.

JUDGE ALDRICH: Excluded.

Q At one time were you a member or were you involved in the operation of the Birth Right organization?

A Yes.

Q Do you understand the policy of that organization to involve counseling individuals who are pregnant?

A Yes.

Q Does Birth Right ever refer individuals for abortions at abortion facilities?

A No.

Q Does Birth Right actively discourage —

MR. REYNOLDS: Objection.

JUDGE ALDRICH: I'm sorry. I was talking to Judge Julian. What was the question?

MR. LUCAS: I was asking her questions concerning an organization by the name of Birth Right that she had been involved with.

JUDGE ALDRICH: We are not interested.

Q Have you been a contributor to the Massachusetts Citizens For Life?

A I contributed a total of two dollars.

Q Have you contributed a great deal of time?

A No, I haven't.

Q You indicated that if one of your daughters became pregnant, you would discuss the pregnancy and the [88] alternatives with her. What would you tell her about the status of the fertilized egg?

A I think we would talk with her about what state of pregnancy she was in at that particular time and deal with her as an individual person.

Q Would you tell her that there was a human being from the moment of conception?

A Yes. We have already told her that and she knows that.

Q Are these religiously based views of yours?

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Excluded.

Q What reasons would you give her primarily if she wanted an abortion and you just disagreed with her?

A What reasons would we give her for our disagreement?

Q Yes.

A I think we would not enter into it in terms of a discussion of disagreement, taking sides, and so on. I think it would be an exploratory kind of thing we would try to do with her in order to come together on the decision-making process. We regard the process of making the decision as immensely important for a family.

Q Would you encourage her under any circumstances to have an abortion?

A I don't think we would encourage her to have an [89] abortion, no.

Q In case she had been raped, would you encourage her to have an abortion?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: Excluded.

Q Would you object to her having an abortion if she had had German measles?

MR. BEHAR: Objection.

MR. REYNOLDS: Objection.

JUDGE ALDRICH: I really don't see the relevancy of any of this examination.

MR. LUCAS: The only relevance is to attempt to show some of the unreasonable grounds on which parental consent could be withheld.

JUDGE ALDRICH: I think you can argue those without producing them from any particular witness. Whether they are reasonable or unreasonable the Court will decide.

Q You indicated in your earlier testimony that there might be some circumstances under which if your daughter decided to go through with an abortion you would support her.

A Yes.

Q What were those circumstances?

A I think the circumstances would be discovered in the decision-making process. If we came to a [90] conclusion, all of us together and probably listening to some professional help: would this seem to be the best course at the time? Under those circumstances, we certainly would support her and would pay for it and we would help to choose the facilities and the gynecologist, and we would see her through it since we are associated with her from the moment of her conception until either one of us dies. We would always be committed to her.

Q Who would have the primary role in selecting the facility under such circumstances?

A I think that it would again be group decision, probably mostly involving her father and me, and the doctors that we would talk with.

Q Have either you or your husband had any medical training?

A Not specifically, no.

Q What does your husband do for a living?

A He is an electronics engineer.

Q If your daughter had an abortion without seeking parental consent, would you attempt to have her prosecuted?

MR. REYNOLDS: Objection.

MR. BEHAR: Objection.

A Oh, no.

JUDGE ALDRICH: You've got the answer.

MR. LUCAS: No further questions. Thank you.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NOS. 75-73, 75-109

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated, *Appellants in No. 75-73,*

JANE HUNDERWADEL, for herself and all others similarly situated, *Appellant in No. 75-109,*

v.

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated, *Appellees in Nos. 75-73 and 75-109.*

MOTION TO AFFIRM AND BRIEF

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JANE HUNDERWADEL, for herself and all others similarly situated, *Appellant in No. 75-109,*

v.

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated, *Appellees in Nos. 75-73 and 75-109.*

MOTION TO AFFIRM

Appellees respectfully move this Court to affirm the judgment of the three-judge District Court upon the ground that the double parental consent requirement of

the Massachusetts abortion law, Mass. Gen. Laws, c. 112, § 12P, is unconstitutional and inconsistent with *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973).

Respectfully submitted:

ROY LUCAS
Attorney for Appellees.

Of Counsel:

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BRIEF IN SUPPORT OF MOTION TO AFFIRM

Appellees respectfully submit this brief in support of the motion to affirm.

CITATION TO OPINION BELOW

The opinion of the three-judge District Court has been officially reported as *Baird* v. *Bellotti,* 393 F. Supp. 847 (D. Mass. 1975).

QUESTIONS PRESENTED

I.

Whether the double parental consent provision of the Massachusetts abortion law, Mass. Gen. Laws, c. 112, § 12P, invades a pregnant minor woman's individual Fourteenth Amendment right of privacy by permitting either parent, for any reason or no reason at all, to veto her access to necessary medical care, regardless of rape, incest, her medical needs, or personal maturity?

II.

Whether the parents of Mary Moe were necessary parties to this action where their interests were protected by the attorney general and a class of parent intervenor-defendants, and disclosure of Mary Moe's identity would have caused her irreparable injury?

III.

Whether a guardian ad litem should have been appointed, even though minor Mary Moe's interests were fully represented by existing parties with identical interests, where she was sufficiently mature to consent to representation of herself, and state law contained no requirement that a guardian be appointed in such a case?

IV.

Whether the District Court should have certified any issues to the Supreme Judicial Court of Massachusetts

when no determination of a state law question would have substantially modified the overriding issues of federal law?

STATEMENT OF THE CASE

This is a civil action under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 by a physician, a pregnant patient, an abortion center, and individuals associated therewith. Plaintiffs sought and obtained from the three-judge court permanent declaratory and injunctive relief. The double parental consent clause of the Massachusetts abortion law, Mass. Gen. Laws, c. 112, § 12P, was held to violate the right of privacy of minor women in light of *Roe* v. *Wade,* 410 U.S. 113 (1973), *In re Gault,* 387 U.S. 1 (1967), and numerous other authorities.

Three days of expert testimony and other evidence were presented to the three-judge court. A thorough opinion by Senior Circuit Judge Bailey Aldrich invalidated the statutory provision in question. A dissenting opinion was filed by Senior District Judge Julian, who had denied relief as well as bail and been reversed in the earlier case of *Baird* v. *Eisenstadt,* 310 F. Supp. 951 (D. Mass.), *rev'd,* 429 F.2d 1398 (1st Cir. 1970), *aff'd,* 405 U.S. 438 (1972).

The respective jurisdictional statements set out the facts with substantial accuracy. Several irrelevant and improper innuendos are made by Appellant-Intervenor in No. 75-109. These are denied. They have no bearing on the double parental consent issue, and will not be addressed.

ARGUMENT

The double parental consent provision of the Massachusetts abortion law, Mass. Gen. Laws, c.112, § 12P, invades a pregnant minor woman's individual Fourteenth Amendment right of privacy by permitting either parent, for any reason or no reason at all, to veto her access to necessary medical care, regardless of rape, incest, her medical needs, or personal maturity.

The constitutionality of various parental-consent-to-abortion laws has been raised in litigation across the United States from Florida [1] to Washington State [2] to Massachusetts.[3] Only one lower court has upheld a parental consent clause, and this Court has noted probable jurisdiction over an appeal from that judgment. *Planned Parenthood* v. *Danforth*, 392 F. Supp. 1362 (E.D. Mo.) (three-judge court), *stay granted pending appeal*, 420 U.S. 918, *prob. jurisd. noted*, U.S. (Oct. 7, 1975) (Nos. 74-1151 & 74-1419).

Relevant lower court controversies, numbering perhaps as many as forty cases, are pending on the privacy rights of minors from ages 15 to 18 regarding access not only to abortion but also to contraceptive information and family planning services.[4] The cases vary from alleged malpractice-battery based on a mature minor's abortion without parental consent [5] to

[1] *Coe* v. *Gerstein*, 376 F. Supp. 695 (S.D. Fla. 1974) (three-judge court), *appeal dismissed*, 417 U.S. 279 (1974), *aff'd*, 517 F.2d 787 (5th Cir. 1975).

[2] *State* v. *Koome*, 84 Wash.2d 901, 530 P.2d 260 (1975).

[3] *Baird* v. *Bellotti*, *supra*, the instant case.

[4] *E.g.*, *Population Services Intn'l* v. *Wilson*, — F.Supp — (S.D.N.Y. July 2, 1975) (74 Civ. 1572), *appeal docketed*, 44 U.S.L.W. 3162 (U.S., Sept. 20, 1975) (No. 75-443).

[5] *E.g.*, *Bogart* v. *Vermont Women's Health Center, Inc.*, No. 412-75-CNC (Vt. Super. Ct., Chittenden Cnty, 1975).

attempted criminal prosecution of a physician for the abortion of a minor who misrepresented her age.[6]

The present appeal differs sufficiently from *Danforth* and presents the opportunity for such a broader perspective on the implications of any decision, that plenary review should be granted for argument in tandem with *Danforth*.

First, this appeal comes with a substantial evidentiary record of testimony from nationally prominent experts on adolescent sexuality and psychology.

Second, this appeal involves a statute requiring the consent of *both* parents to a minor's abortion, not one as in *Danforth*.

Third, separate consideration of this appeal apart from the many other issues in *Danforth* would enable the Court to focus more directly upon the very significant constitutional problems of conflicts among the competing interests of minor women, parents, family, and the State, which have never been fully examined. *Cf. Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *In re Gault*, 387 U.S. 1 (1967); *Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969).

The parental consent issue is too important and has such potential for sweeping impact on other areas of medical care and parental relations that it should not be caught up in the many other issues presented by *Danforth*.

The unanimous weight of authority on parental consent to abortion suggests that such statutes are overbroad and inconsistent with the rationale of *Roe* v.

[6] *E.g.*, *Floyd* v. *Anders*, Civ. No. 75-1481 (D.S.C., 1975).

Wade, supra, and *In re Gault, supra.* See, *e.g., Poe* v *Gerstein,* 517 F.2d 787 (5th Cir. 1975), and cases cited therein. Any collateral issues in this appeal are dependent upon the primary parental consent question and its resolution.

The Court should note probable jurisdiction over this appeal and set the case for argument with Nos. 74-1151 and 74-1419, *Planned Parenthood* v. *Danforth, supra.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

This Motion to Affirm and Brief has been served on all counsel for Defendants and Defendant-Intervenor by First Class Mail this 24th day of October 1975.

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Supreme Court, U. S.
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APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

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In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-73.

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts;
GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,
APPELLANTS,

v.

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,
APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Brief for the Appellants.

Opinion Below.

The opinion of the district court is at 393 F. Supp. 847 (D. Mass. 1975).

Jurisdiction.

On April 28, 1975, the district court entered its order together with its opinion, declaring that the parental consent requirement of the statute violated the United States Constitution and enjoining the defendants from enforcing the provisions of the statute as it relates to parental consent. On May 9, 1975, the court entered a substitute order, nunc pro tunc, correcting a clerical error in the original order. A notice of appeal was filed with the district court on May 16, 1975 (A.J.S. 35-36). Appellants filed their jurisdictional statement on July 12, 1975. Probable jurisdiction was noted on November 17, 1975.

Jurisdiction of this appeal is conferred by 28 U.S.C. § 1253.

Statutes Involved.

The Massachusetts statute involved is Massachusetts General Laws, c. 112, § 12P, which, in cases of abortion, provides:

> (1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.
>
> If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having

> duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient.
>
> (2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.
>
> Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R.

Criminal penalties are imposed by M.G.L. c. 112, §§ 12N and 12Q, which provide:

> § 12N: Except in an emergency requiring immediate action no abortion may be performed under sections twelve I[1] or twelve J[2] unless
>
> (1) the written informed consent of the proper person or persons has been delivered to the physician performing the abortion as set forth in section twelve P and
>
> (2) if the abortion is during or after the thirteenth week of pregnancy it is performed in a hospital duly authorized to provide facilities for general surgery.

---

[1] Section 12I prohibits an abortion if the pregnancy has existed for less than twenty-four weeks unless "in the best medical judgment of a physician, the abortion is necessary under all attendant circumstances."

[2] Section 12J prohibits an abortion if the pregnancy has existed for more than twenty-four weeks unless it is "necessary to save the life of the mother, or if a continuation of her pregnancy will impose on her a substantial risk of grave impairment of her physical or mental health."

Except in an emergency requiring immediate action no abortion may be performed under section twelve J unless performed in a hospital duly authorized to provide facilities for obstetrical services.

§ 12Q: Any person who commits an act in violation of sections twelve L[3] or twelve M[4] shall be punished by a fine of not less than five hundred dollars nor more than two thousand dollars, or by imprisonment of not less than three months nor more than five years, or by both said fine and imprisonment. Conduct which violates sections twelve L or twelve M which also violates any other criminal laws of the commonwealth, may be punished either under this section or under such other applicable criminal laws. Any person who wilfully violates the provisions of sections twelve N or twelve O[5] shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars.

The text of the statute is found at pages 105-110 of the Supplement to Volume 17 of the Massachusetts General Laws Annotated (West Publishing Company, Supp. 1975).

[3] Section 12L regulates the abortion procedure performed under § 12J.

[4] Section 12M requires that a physician performing an abortion under § 12J take necessary steps to "preserve the life and health of the aborted child."

[5] Section 12O provides for the filing with the commissioner of public health certain information if an abortion is performed based upon the exceptions in § 12J.

Questions Presented.

Is the parental consent provision of M.G.L. c. 112, § 12P, unconstitutional under the Fourteenth Amendment to the Constitution of the United States?

Should the district court have joined the parents of Mary Moe I as parties necessary for a just adjudication and appointed a *guardian ad litem* to protect her interests?

Statement of the Case.

Prior Proceedings.

On August 2, 1974, the Massachusetts General Court enacted Chapter 706 of the Acts of 1974 which amended M.G.L. c. 112, by adding §§ 12H to 12R. The legislation was entitled "An Act to protect unborn children and maternal health within present constitutional limits." On October 31, 1974, one day prior to the effective date of the act, the plaintiffs commenced a class action in the United States District Court for the District of Massachusetts (A. 2, 9-18). The plaintiffs, and their respective classes, were as follows:

1. William Baird, a director and chief counselor of the Abortion Center operated by the Parents Aid Society, a corporation organized under the laws of Massachusetts.

2. Gerald Zupnick, M.D., the medical director of the Parents Aid Society Abortion Center. He sued on his own behalf and on behalf of his patients, other physicians similarly situated, and their patients.

3. Mary Moe I and Mary Moe II, both of whom alleged that they would be prevented from obtaining an abortion at the Parents Aid Society Abortion Center should Chapter 706

go into effect. They sued as well on behalf of all pregnant unmarried minors similarly situated.

4. Parents Aid Society, a not-for-profit corporation which operates the Parents Aid Society Abortion Center (A. 10, 11).

The defendants, appellants herein, were the Attorney General of the Commonwealth of Massachusetts and the District Attorney of Suffolk County. At a later date, the plaintiffs moved to join the district attorneys of the other Massachusetts counties as party defendants. This motion was allowed on December 9, 1974 (A. 40-42, 4).

The complaint claimed that M.G.L. c. 112, § 12P, denied the unmarried minor plaintiffs their right to privacy under the Constitution of the United States and this Court's decisions in *Roe* v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973). In addition, the complaint alleged that unmarried minors were being denied the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution. The plaintiffs sought injunctive and declaratory relief enjoining the defendants from enforcing or implementing the parental consent requirement of M.G.L. c. 112, § 12P, and declaring that this section was unconstitutional (A. 9-15).

On the same day that the complaint was filed, United States District Judge Freedman temporarily restrained the enforcement of the statute and granted the plaintiffs' request for a three-judge court (A. 2).

The defendants filed a motion to dismiss and/or for summary judgment on the grounds that: the plaintiffs lacked standing; the action was not ripe for judicial review; the court should abstain; the plaintiffs failed to join parties pursuant to Fed. R. Civ. P. 19; and the plaintiffs failed to state a claim upon which relief could be granted (A. 22-23).

Jane Hunerwadel and other parents moved on November 19, 1974, to intervene in support of the statute on behalf of all parents in Massachusetts with unmarried minor daughters who are or may become pregnant. The motion was allowed on November 20, 1974 (A. 24-28, 3).

A hearing on the continuance of the temporary restraining order was held on November 14, 1974. The court continued the temporary restraining order in effect and scheduled a hearing on a preliminary injunction, which was later combined with the trial on the merits (A. 3, 6). Five expert witnesses in the fields of medicine and psychiatry testified for the parties. Also, Zupnick, Baird, and Hunerwadel testified on their own behalf. Mary Moe I testified *in camera* and her testimony was impounded[6] by the court to prevent discovery of her identity.

On April 28, 1975, a majority of the three-judge district court issued its order declaring § 12P and "such other portions of th[e] chapter insofar as they make specific reference thereto . . . to be unconstitutional and void" (A.J.S. 34). Senior District Judge Julian dissented. The majority ruled that the plaintiffs Mary Moe I, Parents Aid Society and Gerald Zupnick had standing to bring the action in their individual and representative capacities. As to plaintiff William Baird, the court did not find it necessary to rule on his standing because of the "unassailable standing of other plaintiffs" (A.J.S. 5). Of the numerous parents who were allowed to intervene as representatives of Massachusetts parents having unmarried minor daughters who are or might become pregnant, only Jane Hunerwadel testified and presented evidence. Accordingly, the court dismissed the complaint as to intervening parents and minor plaintiffs about whom no evidence was presented. The court also determined that a sufficient controversy existed based upon the following finding:

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[6] Because the testimony was impounded, the transcript of her testimony has not been included in the joint appendix.

> We find that the subject of abortions has excited a great amount of feeling in Massachusetts; that the defendants, as is evident from their activities in this case, are satisfied that the statute is constitutional; that there will be extensive pressure upon them to prosecute in case of a violation, and that it is highly improbable that they would not immediately respond to such pressures. Baird testified that he had been arrested without warning in connection with the Massachusetts birth control statute, so-called, and we believe that public opposition to abortion is more organized and more vocal than was the opposition to birth control. (A.J.S. 7.)

The court made a number of findings in support of the plaintiffs' claim that the statute was facially invalid. In assessing the need for regulating abortions performed on minors, the majority found a low percentage of medical complications resulting from abortions. The court did recognize that guilt feelings following the abortion were possible. All experts agreed, and the court found, that "pregnancy in an unmarried minor is a period of great emotional stress; that support is needed, and that parental support, if forthcoming, is most desirable" (A.J.S. 9). However, the majority took a negative view of the probable reaction of parents to the pregnancy of their unmarried daughter. Despite the fact that Mary Moe's parents did not testify, nor did any other parents of pregnant unmarried minors, the court found "that an appreciable number [of parents] are not [supportive], for a variety of reasons . . . " (A.J.S. 9) and a "significant number of minors who are capable of consenting are unwilling to tell their parents" (A.J.S. 9-10).

The court stated that while the experts differed on the capacity of a minor to give an informed consent, "it is enough

for present purposes that we find that a substantial number of females under the age of 18 are capable of forming a valid consent" (A.J.S. 12).

The majority saw the ultimate issue in the case to be the resolution of the conflict between the minor's personal rights and the separate rights of the parents. Judge Aldrich invalidated the statute because, as he characterized it, § 12P recognized independent rights of parents (A.J.S. 13), in derogation of the fundamental privacy interest of the pregnant minor (A.J.S. 13, 15).

The findings of the dissent diverged significantly from the findings of the majority. Judge Julian took issue with the procedural defects in the proceedings. First, he saw a fundamental conflict in the fact that Mary Moe and the other plaintiffs were all represented by the same counsel. Adequate representation of the minor demanded that a *guardian ad litem* be appointed under Fed. R. Civ. P. 17(c). Second, Judge Julian believed that the parents of Mary Moe were necessary for a just adjudication, thereby requiring their joinder as parties under Fed. R. Civ. P. 19(a).

The most significant divergence was over the question of consent. The dissent stated:

> The majority find that Mary Moe was competent to make and effectuate the decision to abort. The majority also find there are other unmarried pregnant minors in Massachusetts who have adequate capacity to give a valid and informed consent to an abortion. These findings are not warranted by the evidence. (A.J.S. 24.)

Judge Julian concluded that § 12P is a valid exercise of the state's police power and its power as parens patriae which

recognizes parental rights and duties and protects pregnant minors against their own improvidence (A.J.S. 31-32).

The Attorney General filed a notice of appeal on May 16, 1975. Intervenor Jane Hunerwadel filed her appeal on May 20, 1975 (A. 8). On July 12, 1975, the appeal was docketed upon receipt of the Attorney General's Jurisdictional Statement. On November 17, 1975, this Court noted probable jurisdiction and ordered that the case be set for oral argument in tandem with Nos. 74-1151, *Planned Parenthood* v. *Danforth*, and 74-1419, *Danforth* v. *Planned Parenthood*.[7]

[7] In *Planned Parenthood* v. *Danforth*, No. 74-1151, the district court (C.D. Mo.) upheld a statute *inter alia* as follows:

> Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:
>
> . . . . . .
>
> (2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion.
>
> . . . . . .
>
> (4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother. (House Bill No. 1211.)

If a physician fails to comply with the requirements of the statute, he will be guilty of a misdemeanor (§ 14). Unlike M.G.L. c. 112, § 12P, the Missouri statute does not require the consent of both parents. However, there is no express provision in the Missouri statute for judicial review as provided in M.G.L. c. 112, § 12P.

Facts.

The Statute.

Although the statute regulates the performance of abortion upon both minor and adult women,[8] the portion of the statute now under attack applies to pregnant females under the age of eighteen.[9] The statute imposes criminal penalties upon physicians who fail to obtain the informed consent of the proper persons prior to the abortion procedure. Section 12N provides that no abortion may be performed without the consent of the persons enumerated in § 12P. Section 12P requires the consent of the unmarried minor and her parents unless one parent has deserted the family. If both parents are unavailable, then the minor's guardian, or the person who has the care and custody of the minor, may consent to the procedure. If parental consent is refused, consent may be obtained from the Superior Court "for good cause shown."

The Role of Parents.

All experts agreed that parental involvement was desirable and would be beneficial to the emotional and physical well-being of the child (A. 63, 67 (Sturgis), 147 (Hodgson), 89, 92, 177, 180 (Nadelson), 317, 328 (Rivkind), 340, 350, 352 (Yerkes)). In most instances parents would support their daughter and work with the doctor in reaching a decision on whether to terminate her pregnancy (A. 65 (Sturgis), 156 (Hodgson)). The reluctance of minors to inform their parents

[8] The other portions of the statute primarily regulate abortions performed during the third trimester.

[9] The term "minors" applies to persons under the age of eighteen.

was attributable to either fear of punishment or other vindictive reactions (A. 181-182 (Nadelson)). (See Mary Moe testimony, pp. 134-135). The court found that some minors would be reluctant to inform their parents because of the distress the parents would experience on being informed of their daughter's pregnancy (A.J.S. 10). However, the minors' fears are mostly unfounded and, according to the testimony, the parents' predicted reactions seldom materialize (A. 65 (Sturgis), 148 (Hodgson), 182-183 (Nadelson), 343 (Yerkes)).

Informed Consent.

The witnesses disagreed strongly on the question of whether a minor was capable of consenting to an abortion. Plaintiffs Zupnick and Baird testified that they knew of *no* minors who were incapable of giving an informed consent (A. 213, 289). The expert witnesses were less definite on the question. All agreed that the younger patient was less capable of consenting and more in need of parental support (A. 79 (Sturgis), 150 (Hodgson), 342 (Yerkes)). Defendants' experts testified that, as a general class, seventeen year olds were not capable of giving informed consent (A. 316 (Rivkind), 342 (Yerkes)). An inherent problem in addressing the issue of informed consent was the uncertainty as to the precise definition of the term. Moreover, no statistical or other empirical evidence was presented on this question.[10]

[10] The experts testified uniformly that abortion is classified as a surgical procedure (A. 114-115 (Sturgis), 315 (Rivkind)).

Parents Aid Society.

The counseling and medical procedures at the Parents Aid Society Abortion Center were described by Zupnick and Baird at the trial. Upon entering the Center, the patients are given forms to be filled out prior to the operation (A. 217; Mary Moe testimony, pp. 139, 169; Ex. D). Counseling is done in groups comprised of minors and adults with no attempt to separate the two groups (A. 227). Although Dr. Zupnick is available (A. 202), the counseling is done by Baird and Nurse Morrissey (A. 229, 263). The counseling process is brief and is limited to a description of abortion procedures, possible complications and birth control techniques (A. 263; Mary Moe testimony, p. 141). The surgical procedure takes approximately ten minutes followed up with a brief examination of the patient in the recovery room (A. 239-240).

Summary of Argument.

The Court should hold the Massachusetts parental consent statute, M.G.L. c. 112, § 12P, facially valid under the Due Process Clause of the Fourteenth Amendment because it can be interpreted as a reasoned effort to preserve and protect diverse compelling state interests.

Appellants' first argument outlines the four interests advanced by § 12P's requirement that, prior to terminating the pregnancy of a minor, a physician must obtain the consent of both the minor and her parents. The State's first interest lies in supporting the family unit and in assuring that an abortion decision is guided by family members in the child's interest. The State's second interest is its concern for the well-being of its youth. The Legislature has determined that, because

children generally do not possess the capacity for mature judgment, reliance should be placed on parents to supplement a child's decision. The State's third interest is a separate but related concern that decisions specifically affecting health and welfare be made not by a physician alone but by those persons the State considers most worthy of its confidence. The special circumstances which often surround abortions performed on minors, including the fact that the physician is often a stranger to the child, support the State's judgment that parents have an essential role in the counseling and medical decision-making process. The statute promotes the State's fourth interest, that of protecting the minor's right of privacy, by providing for judicial review if parents refuse to consent to their child's abortion. State courts can use this power of review to make an independent assessment of the situation and protect the best interests of the child.

Appellants' second argument places § 12P within the context of established common law principles. These enduring principles provide guidance in determining the zone of permissible state action when fundamental interests in liberty are affected. Appellants show first that the statute has absorbed and refined the common law requirement that physicians obtain parental consent before performing surgery on a child. This requirement is a product of the basic perception that the parents' natural instinct to serve their children's needs surpasses that of any other person. The second common law principle reflected in § 12P is that of parens patriae, the notion that the state has both the authority and the responsibility to protect its citizens. This includes the power to adjust family relationships to advance the welfare of children. The statute's third common law element is its designation of state courts, acting as courts of equity, to review family decision-making to meet the needs of individual fact situations. Massachusetts courts have, in similar areas, developed two ap-

proaches for discharging this responsibility: a rule that a mature minor may obtain surgery without parental consent; and a doctrine that, regardless of parental desires, the best interest of the child must be pursued.

Appellants' third argument turns to the substantive principles set forth by this Court under the Due Process Clause of the Fourteenth Amendment. Of first importance is the Court's recognition that the interest of parents in the care and management of their children is a fundamental value encompassed by the Fourteenth Amendment. Second, the Court has held that the state's interest in the well-being of its youth justifies protective regulation of minors which would be inappropriate for adults. Third, principles of federalism demand that the federal courts exercise restraint in adjudicating facial challenges to state statutes. When a narrowing construction can be perceived which would preserve the statute's constitutionality, a federal court should provide the state an opportunity to impose the narrow interpretation and thereby preserve the law. Because the judicial review provision in § 12P can be administered within narrow, constitutional limits, the Court should reverse the decision of the district court and hold § 12P constitutional on its face.

Argument.

I. The District Court's Finding of Facial Invalidity Should be Reversed Because the Statute can be Interpreted as a Reasoned Effort to Preserve Diverse Fundamental Interests.

The district court found M.G.L. c. 112, § 12P, facially invalid on the theory that the statute subordinated the privacy

interest of a pregnant minor to the competing interests of her parents. The court assumed, without specific illustrations,[11] that some parents would vindictively prohibit their children's termination of pregnancy. Further, the statute's explicit provision for state court intervention in such circumstances failed to influence the majority. State courts would be obliged, the court found, to side with the parents, ignoring the child's own best interest. Finally, the court expressed skepticism concerning the motives of the Legislature and intimated that the statute was impelled by controversial moral notions rather than other, more objective interests.

These findings are unwarranted. They give no credence to the basic role of the family in our society. They pay no respect to the presumption — rooted in concepts of federalism and separation of powers — that state courts and legislatures respect the Constitution and are likely to conduct themselves according to its requirements. Taken together, they are as much at variance with constitutional principles as with our society's collective experience from which such fundamental concepts are built.

Section 12P, if analyzed dispassionately, represents an attempt by the Legislature to weave together interests that are worthy of the Court's respect. These interests are four in number. First, the statute promotes the interest of the State in supporting the family unit and in assuring that a minor's decision to have an abortion is guided by family members, in the child's interest.[12] If the concept of the family is fundamental in our system, then it is for fundamental decisions such

[11] The entire testimony offered by the plaintiffs on this issue is found at A. 191-192.

[12] See discussion in Parts II, A, and III, A, *infra*, and *Wisconsin* v. *Yoder*, 406 U.S. 205, 232 (1972); *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972); *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944).

as the minor's abortion that the need for family should be called into play. The statute underscores the value of the family and aids in the "discharge of family responsibility"[13] by requiring that a physician obtain parental consent before terminating a minor's pregnancy.

The second interest that the State seeks to further in § 12P is its well-recognized and long-respected interest in the "well-being of its youth."[14] In certain areas states have determined that a child is not possessed of the "full capacity for individual choice which is the presupposition of [fundamental constitutional] guarantees."[15] Sometimes, the permissible result is the denial of a basic right — such as the right to vote.[16] In contrast, in § 12P, the State imposes no such substantive prohibition. Rather, it places first reliance on the parents to supplement the child's determination, to assure that the final decision of the child is one informed by those whose knowledge of her capacity is the product of a lifetime relationship.

The State's third interest is in allocating decisions concerning health and welfare to those it considers, under all the circumstances, most worthy of its confidence. Without this statute the abortion decision would lie between a minor and the physician she approaches for an abortion, usually not the family doctor but a stranger. The State here has determined that for a pregnant minor, unlike an adult, counseling and decision-making by strangers are more subject to serious miscalculations. The doctor's review alone may be insufficient,

[13] *Ginsberg* v. *New York*, 390 U.S. 629, 640 (1968).

[14] See discussion in Parts II, B, and III, B, *infra*, and *Ginsberg* v. *New York*, *supra*; *Prince* v. *Massachusetts*, *supra*, at 167, 168, 169.

[15] *Ginsberg*, *supra*, at 650 (Stewart, J., concurring).

[16] See *Oregon* v. *Mitchell*, 400 U.S. 112, 295, n. 14 (1970) (opinion of Stewart, J.).

and consequently the State has decided to give greater credence to parental consent than to a physician's assent. Appellants believe that the record created by plaintiffs, portraying the perfunctory circumstances surrounding the multiple abortions performed by plaintiff Zupnick, strongly supports the State's judgment.[17]

The fourth and final fundamental interest is found in the statute's provision for judicial review. It is the preservation of the pregnant child's interest in having an abortion. The first three interests described above seek to structure the decision process to assist the child in her decision. However, the most sensitively built process may fall short; in such circumstances the independent privacy interest of a pregnant female must be afforded protection. Thus, the Legislature, recognizing that dispute may be inevitable between certain parents and their child, has provided for the intervention of a judge of the state Superior Court. If permitted to operate, defendants believe that these state courts would fashion a system of review to serve the best interests of the child. The state court's history in comparable areas supports such a prediction, for, on their own, Massachusetts courts have already modified parental consent at common law to give recognition to the needs of children.[18]

The combining of these interests in a single law is an enormous undertaking. Great sensitivity will be required of parents, judges, and most of all physicians, to whom the statute is principally speaking. Whether in practice the chosen mechanism will work, appellants, the district court, and this Court can only speculate. Appellants submit that specula-

[17] See pp. 35-39 *infra*.

[18] See Parts II, C, and III, C, *infra*.

tion provides an inadequate foundation for a finding of facial unconstitutionality.

The district court, however, expressed its personal judgments about these matters, undeterred by the absence either of actual statutory practice or well-grounded legislative facts.[19] First, the court found that some parents would be unsupportive, to the contrary, would be vindictive and thus inappropriate participants in the abortion decision:

> We are obliged to find . . . that an appreciable number [of parents] are not [supportive] for a variety of reasons. Moreover, as may be the case with Mary Moe's father, parents may seek to control sexual behavior by threats that they do not mean, or would not carry out in the actual eventuality, but which nonetheless serve to destroy intercommunication. . . .
>
> . . . . . .
>
> We must find . . . that a significant number of minors who are capable of consenting are unwilling to tell their parents, either because they correctly fear what would happen to themselves, or, although they would expect support from their parents in one sense, they know their parents would under no circumstances consent to the abortion they wish, or, because of their views on illegitimacy and the stigma attaching to unmarried mothers, would attempt to make them enter into a marriage they do not want.
>
> . . . . . .

[19] The "legislative facts" offered by plaintiffs were limited in scope, consisting entirely of the testimony of three expert witnesses. This Court, however, may look beyond this testimony in considering legislative facts. *See* Weinstein and Berger, Weinstein's Evidence, vol. 1, ¶200[03] (1975). Recognizing the Court's power to take such judicial notice, appellants offer legislative facts throughout the brief to support the statute's constitutionality.

> . . . We accept the testimony of plaintiffs' experienced experts that some parents would insist upon the continuance of the pregnancy simply as punishment, or to teach a lesson. . . . (A.J.S. 9-10.)

These judgments were made without any testimony from Mary Moe's parents or from other parents who had actually participated in such decisions with their children. Nor was any documentation offered that parents in fact refuse consent for selfish or misguided reasons. The testimony offered on these matters is conjectural at best and a slim basis for the global conclusions on family matters drawn by the court.[20]

Next, the district court intimated its view as to the motives of the Legislature which enacted M.G.L. c. 112, § 12P, stating:

> [W]e . . . recall that the Commonwealth itself argued in *Baird* v. *Eisenstadt,* 1 Cir., 1970, 429 F. 2d 1398, 1401, *aff'd,* 405 U.S. 438, that the prevention of fornification is so important that it justified withholding birth control devices from unmarried adults, with the resultant risk of pregnancy. The fact that the Court of Appeals expressed shock at this view does not mean it does not exist, but merely illustrates the degrees of variance and the strength of opinions on this subject. (A.J.S. 10.)

Judge Aldrich thus imputed to the current statute the legislative motives that prompted the ill-considered statute in

[20] For further discussion of the experts' testimony, to the effect that parental support is important to the well-being of the pregnant child, see pp. 42-43, n. 34, *infra.*

Eisenstadt v. *Baird.* This presumptive condemnation of a statute based upon past legislative judgments is unjustified. To the contrary, each statute must come to court carrying a strong claim for judicial respect. That respect is notably absent in the opinion of the district court.

As a third reason for its judgment the court found that there is no "magic" to the eighteenth birthday in requiring parental consent:

> [I]t is enough for present purposes that we find that a substantial number of females under the age of 18 are capable of forming a valid consent. (A.J.S. 12.)

This finding obviously influenced the outcome below. The court looked with disfavor upon what it viewed as an irrebuttable presumption in § 12P that minors lack the capacity for informed consent. However, it neglected to analyze whether the statute was likely in practice to restrain the exercise of that valid consent by mature pregnant minors. As subsequent sections of this argument establish, the growth of the "mature minor" rule at common law represents a direct and conscious recognition by courts of the capacity of certain minors for autonomous decision-making. Using this rule a Superior Court judge might well find "good cause" for respecting the minor's wishes, independent of the views of her parents.

The majority opinion gave short shrift to the possibility that this or other standards of judicial review could preserve the statute's constitutionality; its treatment of the statute's judicial review provision was relegated to a footnote:

> The dissent is seemingly of the opinion that a reviewing Superior Court judge would consider only the interest of

> the minor. We find no room in the statute for so limited an interpretation. (A.J.S. 14.)

Later, the majority characterized the judicial review provision as merely "a constraint on the assertion of unreasonable claims of the parents" (A.J.S. 15).

Both the mature minor rule and the "child's best interest" doctrine[21] would, in practice, channel the court's review within the bounds of constitutionality. Given these well-established standards the district court's unwillingness to provide the state court an opportunity to apply the law offends deep-seated values of federalism. As this Court recently noted in a case touching fundamental First Amendment interests:

> [W]hen considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program. . . . [A] state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts. . . . *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1975).

It may well be true that statutes in other states requiring parental consent lack the realistic basis for a narrowing construction, because they have no provision for judicial review. *See, e.g., State* v. *Koome*, 84 Wash. 2d 901, 916-917, 530 P. 2d 260, 269-270 (1975) (Finley, J., concurring). By contrast, the potential for flexible statutory construction is

[21] See Part II, C. *infra.*

provided here by the explicit interjection of the state court on behalf of the child. This provision militates for reversal of the district court's finding of facial invalidity.

The final supporting prop in the district court's decision is its portrayal of the statute as cast exclusively in terms recognizing rights of parents independent of their children. Thus, the question the majority addressed was whether "parents possess, apart from right to counsel and guide, competing rights of their own?" (A.J.S. 15).

In subsequent sections appellants clarify what the court below refers to as "competing rights" of parents.[22] Briefly, appellants believe that the rights of parents independent of the child, while flexible, are always dependent upon the interests of the child. On limited occasions, not here relevant, competing parental demands may permit judgment about a child's life that would be inappropriate if the child's best interest *alone* were the basis for judgment.[23] However, it is plain that when a fundamental matter such as termination of pregnancy is at stake, the parents may not properly consider a factor external to the child's own interests. In this situation the "competing" parental right consists exclusively of the right to assess independently, for their minor child, what will serve that child's best interest. The parents' right here is a function of their greater relative capacity for judgment. However, in operation, the parents' actual deliberation must range no further than would that of a pregnant adult making her own abortion decision.

[22] See Parts II, A, C and III, A, C, *infra.*

[23] One example is parental judgments dictated by competing demands for resources to serve the needs of a large family. *Cf. Libby* v. *Arnold*, 161 N.Y.S. 2d 798, 799-800 (Dom. Rel. Ct. 1957); *Meek* v. *Meek*, 318 S.W. 2d 851 (Ky. 1958).

Viewed in this light, the statute does not give parents a "veto" over their child's abortion. Nor does the statute subordinate the child's interest to "parents' independent rights [that] remain formidable" (A.J.S. 15). Rather, the statute can, and should at this point, be interpreted as recognizing the many dimensions of the pregnant minor's plight. The four interests this statute may be deemed to serve are worthy of this Court's respect. The state courts should be given the opportunity to show that these legislative efforts can be sensitively implemented in a manner which is faithful to constitutional principles.

II. The Statute Codifies the Traditional Common Law Requirement of Parental Consent and is Based on Principles Designed to Protect the Best Interests of Minors and Preserve the Institution of the Family. These Principles Merit Constitutional Recognition.

In *Roe* v. *Wade*, 410 U.S. 113, 153 (1973), this Court expressed its feeling that the right of privacy — including a woman's decision whether or not to terminate her pregnancy — is "founded in the Fourteenth Amendment's concept of personal liberty." The Court thus accepted openly the idea that the Due Process Clause possessed a substantive content not "limited by the precise terms of the specific guarantees elsewhere provided in the Constititution." *Roe* v. *Wade*, 410 U.S. at 169 (Stewart, J., concurring). In Justice Stewart's words, these concepts of liberty constitute a "rational continuum." *Ibid.* They "were purposely left to gather meaning from experience." *Ibid.*, quoting Frankfurter, J., in *National Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (dissenting opinion).

One source for evaluating the contours of the concept of personal liberty is the common law. *See Roe* v. *Wade*, 410 U.S. at 132-141. This vast body of judicial experience, shaped by principles which have endured centuries of change and growth, can provide the Court with a sound framework for evaluating the weight of the interests pursued in M.G.L. c. 112, § 12P.

Modern American society depends heavily upon the common law for the fabric of its rules regulating relations among family members and between the family and the state. Specifically, the courts have fashioned three pertinent doctrines: a requirement that physicians obtain parental consent before performing surgery on a child; a responsibility on the part of the state as parens patriae to promote the welfare of its citizens; and a supervisory capacity in courts of equity to review family decision-making and adjust common law rules to meet the needs of individual fact situations. M.G.L. c. 112, § 12P, combines these three approaches to produce a regulatory scheme which, if permitted to operate, would absorb the common law tradition of reshaping legal requirements governing family relationships in light of changing social preferences.

The principal characteristics of the pertinent common law tradition deserve brief review.

A. *The Statute Absorbs and Refines the Common Law Requirement that a Physician Obtain Parental Consent Before Performing Surgery upon a Minor.*

Mr. Justice Cardozo, in an oft-quoted sentence written as a member of the New York Court of Appeals, stated the traditional common law rule requiring a patient's consent to medical procedures: "Every human being of adult years and sound mind has a right to determine what shall be done with

his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages . . . [citations omitted]." *Schloendorff* v. *Society of New York Hospital*, 211 N.Y. 125, 129-130, 105 N.E. 92, 93 (1914). This well-established requirement is grounded both in fundamental tort notions concerning individual autonomy and bodily integrity and in established contract principles. *See, e.g., Canterbury* v. *Spence*, 464 F. 2d 772 (D.C. Cir. 1972) (action based upon failure of surgeon to secure informed consent of minor's mother); *Hawkins* v. *McGee*, 84 N.H. 114, 146 A. 641 (1929) (action for breach of contract by surgeon); *Wall* v. *Brim*, 138 F. 2d 478 (5th Cir. 1943) (operation performed without consent is a technical battery; consent creates a contract limited to extent of consent given); *see generally*, Waltz and Scheuneman, Informed Consent to Therapy, 64 Nw. U.L. Rev. 628 (1970).

The decision to consent to medical treatment is often a difficult one since it requires an evaluation of risks and benefits determined on the basis of specialized knowledge with which most patients are unfamiliar. Nevertheless, the courts have strictly enforced a physician's duty to obtain effective or "informed" consent, largely out of a recognition of the fundamental importance of the principle articulated by Cardozo. *E.g., Canterbury* v. *Spence, supra*, at 780; *Cobbs* v. *Grant*, 8 Cal. 3d 229, 245, 502 P. 2d 1, 11 (1972) (" . . . patient's right of self-decision is the measure of the physician's duty to reveal . . . "). Recognizing that minors are generally incapable of making such difficult decisions, the common law of both torts and contracts preserves society's desire to protect a minor's individual autonomy and bodily integrity by requiring the consent of capable persons, usually parents, to medical procedures performed on a child. *Bonner* v. *Moran*, 126 F. 2d 121, 122 (D.C. Cir. 1941); *see Ballard* v. *Anderson*, 4 Cal. 3d 873, 878, 95 Cal. Rptr. 1, 4 (1974) (parental consent is

traditionally required for medical services to minors because "minors may disaffirm their own contracts to acquire such services"); *see generally* Wadlington, Minors and Health Care: The Age of Consent, 11 Osgoode Hall L.J. 115 (1973).

The law reposes this authority with a child's parents because experience has shown that their natural instinct to care and nurture surpasses the interest of any other person in advancing the child's welfare. 1 W. Blackstone, Commentaries Ch. 16 (natural duty of parents to maintain their children, while enforced by laws, is best guaranteed by "Providence . . . by implanting in the breast of every parent that natural or insuperable degree of affection . . . " which neither individual parent's depravity nor rebellious children can totally extinguish); *In re Agar Ellis*, 24 Ch. D. 317, 329 (1883) (Cotton, L.J., concurring: court's determination of child's best interests must have "regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice . . . "); *In re Hudson*, 13 Wash. 2d 673, 126 P. 2d 765 (1942) (parents have paramount right to decide questions affecting the welfare of their children unless their right is forfeited by neglect). Four aspects of this common law tradition are particularly relevant to the case at hand. First, the well-established view is that the nature of the specific procedure in question is irrelevant to the patient's right to grant or withhold "informed consent." Second, the common law leaves unsettled the question of whether one or both parents are to give consent on behalf of a child. Third, parents have certain obligations to their children which govern their granting or withholding of consent. Fourth, the allocation of decision-making power to parents is not absolute.

Performance of a medical procedure involving an invasion of the body is a battery at common law unless informed consent of the patient is secured. *Reddington* v. *Clayman*, 334 Mass. 244, 134 N.E. 2d 920 (1956); *Canterbury* v.

Spence, supra. It makes no difference whether the procedure is serious or routine, necessary or elective, innovative or well-established. Among the important policies which justify this strict rule is a desire to provide protection against the unknowing assumption of risks inherent in virtually any invasion of the body. In this regard, few decisions rival the difficulty of the determination to undergo abortion surgery. The essential result of an abortion is the truncation of the natural reproductive process. This interruption is troublesome for many people in our society. It has a variety of philosophical and religious implications that as yet are imperfectly understood by scholars and religious thinkers. *See, e.g.,* Hare, Abortion and the Golden Rule, 4 Philosophy and Public Affairs 201 (1975); The Rights and Wrongs of Abortion (M. Cohen, T. Nagel, and T. Scanlon, ed., Princeton 1974). Regardless of its legal status, the abortion decision unavoidably involves a concern for life and a realization of the finality of death. Few human beings make more serious decisions.

First trimester abortion surgery also involves physical risks and may have serious emotional and psychological consequences requiring competent professional assistance. These risks are usually deemed acceptable by medical standards. They nonetheless are undeniably real, and § 12P adopts the common law's principle of requiring physicians to obtain a patient's informed consent in order to assure that minors realize the possible consequences of abortion surgery. *See Canterbury* v. *Spence, supra.* [24]

[24] Indeed, the statute, recognizing the difficulty of the abortion decision, increases the legal protection of minors. At common law, since the consent of a minor to a medical procedure was ineffective, physicians were under no compulsion to secure it, but rather dealt only with the parents. *In re Seiferth,* 309 N.Y. 80, 87, 127 N.E. 2d 820, 824 (1955) (Fuld, J. dissenting); *In re Sampson,* 65 Misc. 2d 658, 317 N.Y.S. 2d 641 (Ulster Cnty. Fam. Ct. 1970) (quoting with approval Judge Fuld's dissent in *Seiferth*), *aff'd,* 29 N.Y. 2d 900, 278 N.E. 2d 918 (1972); *see In re Hudson,* 13 Wash. 2d 673, 709-710, 126 P. 2d 765, 782 (1942) (decision to permit minor to undergo surgery is responsibility of parents). Although most physicians may make a practice of securing patient consent regardless of legal effectiveness, *see* Baron et al., Organ and Tissue Transplants from Minor Donors in Massachusetts, 55 B.U.L. Rev. 159 (1975), certainly some physicians do not, and perform procedures upon patients who have not agreed to them. Section 12P effectively forecloses the possibility of a physician's performing an abortion upon a minor without first securing her consent *as well as* that of her parents. The requirement in § 12P that a physician obtain the consent of a minor before performing an abortion thus works a salutary change in the common law.

Finally, § 12P, like the common law rule, places the burden of compliance upon those best able to obey it — medical personnel — and not upon the child herself. Experience has demonstrated that a strict allocation of the burden is necessary because most patients are unable to appreciate the ramifications of medical services without careful explanation by trained personnel. Absent potential legal sanctions, some physicians may not adequately help patients develop a satisfactory understanding. *See, e.g., Canterbury* v. *Spence, supra.*

The second pertinent aspect of the common law tradition is its changing attitude toward the adequacy of the consent of one parent where both have custody of the child. Although originally at common law the father's consent alone was adequate to authorize conduct affecting a child, modern decisions reflect the current view that both the father and mother should share equally in making decisions affecting their children. *Compare* 1 W. Blackstone, Commentaries Ch. 16, *and Barry* v. *Sparks,* 306 Mass. 80, 27 N.E. 2d 728 (1940), *with In re Rotkowitz,* 175 Misc. 948, 951, 25 N.Y.S. 2d 624, 627 (N.Y.C. Dom. Rel. Ct. 1941) (court authorized operation consented to by mother and opposed by father); *see* M.G.L. c. 201, § 5 (parents share custody of child "jointly" unless

found unfit). The situation at common law in Massachusetts, while somewhat uncertain, appears to be that physicians must obtain the consent of both parents if they are available and no emergency exists. *Cf. Reddington* v. *Clayman*, 334 Mass. 244, 246-247, 134 N.E. 2d 920, 921-922 (1956) (battery action against surgeon by parents for unauthorized removal of tissue during tonsillectomy suggesting consent of both parents required). The *Reddington* opinion was construed in an Attorney General's opinion (1966 Op. A.G. 247) rendered to the Commissioner of Mental Health concerning proposed surgery on incompetents. The Attorney General stated that, "[i]f a patient has not attained his majority and is unmarried, the consent of his parents, as natural guardians, is necessary . . . [citations omitted]. If either parent is dead, the permission of the surviving parent should be sufficient. . . ." *See also* M.G.L. c. 201, § 5.[15] While courts in other jurisdictions have sometimes suggested *sub silentio* that the consent of a single parent may be sufficient at common law, *see, e.g., In re Hudson*, 13 Wash. 2d 673, 677, 126 P. 2d 765, 768 (1942), § 12P resolved ambiguity on the point in Massachusetts by stating explicitly that physicians must obtain the consent of both parents before proceeding with abortion surgery on a child.

The third common law principle embodied in § 12P is that parental authority over a child and the derivative duty of a physician to seek parental consent before performing surgery are premised on the parents' obligation to act in their child's best interests. The trust the common law thus imposes upon parents is one of long standing. *See* 1 W. Blackstone, Commentaries Ch. 16 ("*power* of parents over their children is derived from . . . their duty . . . to provide for their maintenance . . . " [emphasis in original]); *Wellesley* v. *Wellesley*, 4 Eng. Rep. 1078 (H.L. 1828) (in affirming action of Court of Chancery depriving father of custody of his children on the basis of his adulterous conduct, Lord Redesdale asked rhetorically: "Why is the parent entrusted with the care of his children? Because it is generally supposed he will best execute the trust reposed in him . . . "); and *Purinton* v. *Jamrock*, 195 Mass. 187, 201, 80 N.E. 802, 805 (1907) ("The right of the parents is not an absolute right of property, but is in the nature of a trust reposed in them, and is subject to their correlative duty to care for and protect the child . . . ").

[15] The practice of some hospitals seems to require consent of both parents. *See* Baron et al., *supra*, note 24.

Section 12P implicitly adopts this common law principle that parents must exercise their authority to promote their children's best interests and applies it specifically to family decision-making concerning a child's abortion. Any other interpretation of the statute would place it squarely in contradiction with a legal tradition which antedates the founding of the Commonwealth and has been forcefully reiterated by the Supreme Judicial Court from early years to present day. *Commonwealth* v. *Hammond*, 27 Mass. (10 Pick) 274 (1830), *cited in Curtis* v. *Curtis*, 71 Mass. (5 Gray) 535, 537 (1856) (Shaw, C.J.: "This is not a question of mere property — whether the mother . . . is entitled to the earnings of the minor. But the interest of the minor is the principal thing to be considered . . . [citations omitted]"); *Richards* v. *Forrest*, 278 Mass. 547, 553, 180 N.E. 508, 511 (1932) ("It has been said that the first and paramount duty of courts is to consult the welfare of the child. To that governing principle every other public and private consideration must yield . . . "); *Wilkins* v. *Wilkins*, 324 Mass. 261, 262, 85 N.E. 2d 768, 769 (1949) ("In determining whether parents are unfit, the most important consideration is whether the welfare of the child would be served by custody in them or in a guardian . . . "); *In re Kauch*, 358 Mass. 327, 264 N.E. 2d 371 (1970) (rule of *Wilkins* cited with

approval). A legislative intention to work such a drastic change in the Commonwealth's established law should not be lightly inferred. See *Corcoran* v. *S.S. Kresge Company*, 313 Mass. 299, 303, 47 N.E. 2d 257, 258-259 (1943) (" . . . statutes . . . made in derogation of the common law are to be construed strictly . . . ").

Finally, the law's authorization of parents to make decisions on behalf of their children is not absolute but rather subject to review and adjustment by the state. The refusal of the common law to permit parents to act as the final arbiter of their children's best interests is a corollary of the theory that the parents have a duty as trustees of their welfare. *Richards* v. *Forrest*, *supra*. This common law doctrine, discussed in the next section, is referred to as parens patriae; it enables the state to impose limits on the freedom of parents to make decisions on behalf of their children. *See Wellesley* v. *Wellesley*, 4 Eng. Rep. 1078, 1081 (H.L. 1828) (equity courts exercise a " . . . right which devolves to the Crown, as *parens patriae*, and it is the duty of the Crown to see that the child is properly taken care of . . . ").

B. *The Common Law Requires the State, as Parens Patriae, to Advance the Best Interests of Minors Facing Abortion Decisions.*

The doctrine of parens patriae, the notion that the state is the legal parent of its citizens, found early expression in guardianship cases decided by English common law courts. *See, e.g., Eyre* v. *Shaftsbury*, 24 Eng. Rep. 659, 664 (Ch. 1722) (" . . . King is bound of common right, and by the laws to defend his subjects . . . "); *Wellesley* v. *Wellesley*, 4 Eng. Rep. 1078 (H.L. 1828) (power of Court of Chancery, recognized for over 150 years, to promote best interests of minors on

King's behalf as parens patriae is not open to question). Blackstone traces the doctrine back to Fitzherbert's Naturia Brevium, 3 W. Blackstone, Commentaries *427, a source which Story characterizes as "a very ancient work of great authority . . . "; 2 Story, Equity Jurisprudence *666. Story also considered the power well-established; *id.* at 672. The doctrine received perhaps its best known constitutional recognition in this country in *Prince* v. *Massachusetts*, 321 U.S. 158 (1944). See pp. - , *infra*. It is now a well-established component of both our common and constitutional law. *In re Hudson*, 13 Wash. 3d 673, 696-697, 126 P. 2d 765, 777 (1942); *People* v. *Labrenz*, 411 Ill. 618, 623-624, 104 N.E. 2d 769, 773 (1952) (parens patriae responsibility of government is a source of equity jurisdiction "of ancient origin"); *Morrison* v. *State*, 252 S.W. 2d 97 (Mo. 1952) (traces parens patriae responsibility to Aristotle); *Jehovah's Witnesses in the State of Washington* v. *King County Hospital*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd citing Prince*, *supra*, 390 U.S. 598 (1968); *see Richards* v. *Forrest*, 278 Mass. 547, 180 N.E. 508 (1932); *In re Clark*, 21 Ohio Op. 2d 86, 90, 185 N.E. 2d 128, 132 (C.P. Lucas Cnty. 1962) (child is a citizen of the state and state's chief duty is to protect " . . . right to live and to grow up with a sound mind in a sound body, and to brook no interference with that right by any person or organization . . . "); *In re Sampson*, 317 N.Y.S. 2d 641 (Ulster Cnty. Fam. Ct. 1970), *aff'd*, 29 N.Y. 2d 900, 278 N.E. 2d 918 (1972).

Under the doctrine of parens patriae, a state may make a variety of adjustments in a family relationship. It can require children to attend school,[26] receive vaccinations,[27] and postpone marriage.[28] It can remove a neglected child, either

[26] *State* v. *Bailey*, 157 Ind. 324, 61 N.E. 730 (1901).

[27] *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905).

[28] *See Parton* v. *Hervey*, 67 Mass. (1 Gray) 119 (1854).

temporarily or permanently, from its parents' custody. *In re Sampson, supra; In re Kauch*, 358 Mass. 327, 264 N.E. 2d 371 (1970) (interpreting M.G.L. c. 201, § 5). It can intervene in the management of the family to assure that parents support their children. *Richards* v. *Forrest, supra.* It can review parental judgments which risk one child for the benefit of another. *Nathan* v. *Farinelli*, 1974 Ins. L.J. 411 (Mass. Sup. J. Ct., July 3, 1974). And it can overturn parental judgments which are contrary to a child's best interests. *In re Sampson, supra; In re Clark, supra.*

The Massachusetts Supreme Judicial Court, recognizing the awesome authority this power represents, has erected a clear beacon to guide judges in its use. In the context of family relationships, the state must use its parens patriae power to advance the welfare of children. *Dumain* v. *Gwynne*, 92 Mass. (10 Allen) 270, 271-272 (1865) (adopting English rule that test of proper exercise by equity court of parens patriae power is the welfare of children); *Richards* v. *Forrest, supra,* at 553; *In re Kauch, supra.* Section 12P should be read as an effort to effectuate this well-established parens patriae doctrine.

C. *The Judicial Review Provision of § 12P Adopts a Proven Approach Protecting the Best Interests of Minors.*

Having established the requirement that physicians obtain parental consent before performing abortion surgery on a minor, the Legislature went on to provide for its supervision and control by the Superior Court. Implicit in this arrangement, based directly on the common law, is the notion that parental decisions which do not further a child's best interests should not be allowed to stand. *See Wellesley* v. *Wellesley*, 4 Eng. Rep. 1078 (H.L. 1828); *Dumain* v. *Gwynne, supra;*

Nathan v. *Farinelli, supra; People* v. *Labrenz*, 411 Ill. 618, 104 N.E. 2d 769 (1952); *In re Sampson, supra.* This supervisory role is one with which the courts of the Commonwealth, perhaps more so than any other state, have gained substantial experience. In particular, Massachusetts courts have had to address the problems associated with authorizing surgery on minors. *See generally, Nathan* v.*Farinelli, supra;* Curran, A Problem of Consent: Kidney Transplantation in Minors, 34 N.Y.U.L. Rev. 891 (1959); Baron et al., Organ and Tissue Transplants from Minor Donors in Massachusetts, 55 B.U.L. Rev. 159 (1975). The explicit provision of judicial review in § 12P assures that adjustments can be made to meet the needs of individual fact situations.

The district court, however, concluded that this provision is designed to protect parental interests irrespective of the best interests of a pregnant child (A.J.S. 13-14, esp. n. 10; but see Julian, J., dissenting, A.J.S. 31). This interpretation neglects the proven approach the Commonwealth's courts have developed at common law to protect the best interests of minors.

English courts of chancery were the King's administrators of his parens patriae power to protect the welfare of children. *Wellesley* v. *Beaufort*, 38 Eng. Rep. 236, 244 (1827). The Commonwealth's equity courts, along with most other state courts, inherited this authority from their English counterparts. *Dumain* v. *Gwynne*, 92 Mass. (10 Allen) 270, 271-272 (1865); *see, e.g., In re Hudson*, 13 Wash. 2d 673, 126 concomitant of this reception of common law in Massachusetts is the rule that the parens patriae power must be used to further the welfare of children. *Dumain* v. *Gwynne, supra;* see pp. 32-34, *supra.* The Massachusetts courts have developed two complementary approaches to discharging this responsibility: (1) a flexible version of the "mature minor" rule and (2) a willingness to assure independently the best

interest of the child. Section 12P should be read with these related approaches in mind.

The mature minor rule appears to have developed as a natural part of the exercise of equity jurisdiction. The recent growth of the rule in the context of surgical cases[29] has been characterized as a judicial response to the harshness of requiring parental consent for all medical treatment performed

[29] The rule originated in custody proceedings. There, it has involved a two-step judicial process of eliciting the views of an older child and then reaching a decision, based upon those views, as to the child's best interests. Thus, in a habeas corpus proceeding concerning custody of a sixteen-year-old child, Chief Justice Shaw first interrogated the minor as to her wishes and then began his opinion by stating:

> This is not a question of mere property — whether the mother or Fairbank is entitled to the earnings of the minor. But the interest of the minor is the principal thing to be considered . . . [citations omitted]. *Curtis* v. *Curtis*, 71 Mass. (5 Gray) 535, 537 (1856).

Custody cases are different from surgical procedure cases because, while the welfare of the child is the standard for judicial decision in both, surgical procedures, particularly abortions, affect a child's immediate physical well-being. Further, the mature minor rule would appear to have readier application in surgery situations than in custody disputes. Consent in surgery is primarily related to maturity of judgment. In comparison, issues relating to custody reflect fundamental concepts of social organization and long-term welfare, and consequently maturity of children may play a more limited role. *Compare Younts* v. *St. Francis Hospital and School of Nursing, Inc.*, 205 Kan. 292, 469 P. 2d 330 (1970) (mature minor rule applied to surgery involving seventeen-year-old), *with In re Kauch*, 358 Mass. 327, 329, 264 N.E. 2d 371, 373 (1970) (in custody proceeding involving sixteen- and twelve-year-old boys, children's preference for custody by aunt disregarded in favor of father's claim at common law and under M.G.L. c. 201, § 5). It is not surprising, therefore, that the mature minor rule has found widespread use in cases involving the authorization of surgery upon minors.

on minors. Wadlington, Minors and Health Care: The Age of Consent, 11 Osgoode Hall L.J. 115 (1973). The rule permits judges to make an independent appraisal when physicians under nonemergency circumstances propose to provide minors with medical care without the consent of their parents. The court determines whether the child is capable of giving effective "informed" consent. In these cases, the rule amounts to judicial recognition that the safeguard of parental consent is not required when the minor's decision is maturely reached. Wadlington, *id.* at 117-119. In Massachusetts the Supreme Judicial Court took precisely this approach in approving a seventeen-year-old minor's nontherapeutic donation of bone marrow by finding that the proposed donor was " . . . capable of consenting to the proposed procedure so as to prevent the creation of liability therefor." *Rappeport* v. *Stott*, Civil No. J 74-57 (Mass. Sup. J. Ct., Aug. 28, 1974), slip op. at 3, *discussed in* Baron et al., Organ and Tissue Transplants from Minor Donors in Massachusetts, 55 B.U.L. Rev. 159 (1975).

Section 12P explicitly provides for the continued operation of the mature minor rule. The last paragraph of the statute provides that

> Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R.

This language should be read as permitting a minor, one of her parents, or someone else on behalf of the child to file a complaint in the Superior Court seeking judicial authorization for proposed abortion surgery. Importantly, such a complaint could be filed *regardless* of whether the parents had been

consulted or had withheld their consent.[30] Since the common law right of a mature minor to consent to surgery is based upon the theory that the child is able to comprehend all the consequences of the procedure, the policies justifying the requirement of parental consent in § 12P do not apply. Therefore, the most harmonious reading of § 12P, from the point of view both of its language and structure and of the policies it seeks to promote, is one which recognizes its consistency with the common law and its implicit incorporation of the mature minor rule. *Cf. Ballard* v. *Anderson*, 4 Cal. 3d 873, 883, 95 Cal. Rptr. 1, 8 (1971).

Section 12P also provides a mechanism, consistent once again with the common law, to protect a child when, because of her incapacity to given informed consent, the mature minor rule is inapplicable. Under § 12P(1) the court is authorized to grant permission for an abortion for "good cause shown." The use of the phrase "good cause" in other statutes in Massachusetts has been interpreted liberally and held to mean, in effect, a rational reason. *See, e.g., Rinaldo* v. *School Committee of Revere*, 294 Mass. 167, 169, 1 N.E. 2d 37, 38 (1936) ("good cause" under school tenure act includes any good faith ground which is not arbitrary, irrational, unreasonable, or irrelevant and is fairly debatable and honestly asserted); *Jenney* v. *Tilden*, 270 Mass. 92, 95, 169 N.E. 669, 670 (1930) ("good cause" in tax redemption statute means that which "in equity and good conscience" should entitle one to redeem); *Raytheon Company* v. *Director of Division of Employment Security*, 344 Mass. 369, 182 N.E. 2d 293 (1962) (quoting with approval *Sturdevant Unemployment Compensation Case*, 158 Pa. Super. 548, 557 (1946), that "good cause" in unemployment compensation statute means "necessitous circumstances . . . ").

[30] Moreover, state equity courts provide for both anonymity of parties and impoundment of court papers. *See, e.g., Doe* v. *Doe*, Mass. Adv. Sh. (1974) 1089, 314 N.E. 2d 128 (1974).

Placed against this background, "good cause" in § 12P(1) appears to mean reasons adequate to persuade a judge, on the basis of traditional equity notions, to authorize the surgery. Paramount among such reasons would be a showing that an abortion is in the minor's best interests. *See Richards* v. *Forrest, supra.* Relevant also would be a lack of any harm to the parents, the availability of a qualified surgeon, and the recommendations of outside experts, including child psychologists and religious counselors.[31] Although phrased in terms which seem to place a burden on the minor, the statute actually authorizes the Superior Court to substitute its judgment for that of a child's parents if equity and good conscience suggest that it should do so.[32]

In summary, § 12P is firmly grounded in the common law tradition and uses three well-established approaches — parental consent, parens patriae, and judicial supervision — in a coordinated effort to help minors make the best possible decision concerning pregnancy. Following the common law tradition, § 12P does not prescribe an outcome. It neither requires nor bars abortion surgery for minors. Rather, it creates a process for decision-making. Defendants believe that this process is faithful to the teaching of the common law and, as such, embodies principles which merit constitutional respect.

[31] It is now well-established that parental religious beliefs cannot be used to justify withholding medical care from children, and any denial based solely upon such a ground could not withstand a showing of a child's desire for an abortion. *See Jehovah's Witnesses in the State of Washington* v. *King County Hospital*, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968).

[32] Section 12P also removes a procedural burden usually imposed on children by relaxing the common law rule, codified in Mass. R. Civ. P. 17(b), that the court must appoint a *guardian ad litem* to represent a minor.

III. The Legislature's Effort to Resolve Compelling Interests by Requiring Parental Consent Subject to Judicial Review is Within the Bounds of the Due Process Clause of the Fourteenth Amendment.

A. *The Statute Preserves the Primacy of the Family Unit by Reinforcing the Role of Parents in Fundamental Decisions Affecting Family Members.*

This Court has stated plainly its view of the parents' role in our society:

> It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* v. *Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).
>
> The Court has frequently emphasized the importance of the family. . . . "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer* v. *Nebraska*, [262 U.S. 390] at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner* v. *Oklahoma*, [316 U.S. 535] at 541, and the Ninth Amendment, *Griswold* v. *Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring). *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972).

The Massachusetts Legislature, in enacting c. 112, § 12P, has sought to advance the same basic constitutional values that the state in *Stanley* impinged upon. There, the Court struck down an Illinois statute that automatically deprived an unwed father of the custody of his children following the death of the children's natural mother. The Court held that under the Due Process Clause the father was entitled to a hearing on his fitness as a parent. The Court rejected the irrebuttable presumption created by the statute that unmarried fathers are unqualified to raise their children. 405 U.S. at 653. Such a statute, said the Court, "needlessly risks running roughshod over the important interests of both parent and child." 405 U.S. at 657. Drawing upon the same values as the Court's opinion in *Stanley*, § 12P reflects a belief that protection of minors from acts which may be improvident, unsafe, and, on later reflection, profoundly regretted, rests with those who are naturally best suited to understand and assist a child during a difficult period.[33]

One obvious basis for making parents a party to the abortion decision is the intimate knowledge they possess of their child's struggles with adolescence and the elements of her growth which should be considered at this critical time. Indeed, the district court itself recognized the value of parental involvement:

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[33] Unlike the statute in *Roe* v. *Wade*, 410 U.S. 113 (1973), the provision for parental consent imposes no substantive judgment about the propriety of abortion. In *Roe* the Texas statute prohibited a woman from obtaining an abortion, regardless of the decision she and her physician had made. Here, by contrast, § 12P provides that, when the factors surrounding an abortion are being considered and a decision being reached, a child's parents should play a primary role.

On the propriety of state action viewed as an allocation of the decision-making role to the family, *cf.* Tribe, Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 34-38 (1973).

> All experts agreed that pregnancy in an unmarried minor is a period of great emotional stress; that support is needed, and parental support if forthcoming, is most desirable . . . [W]e believe that most [parents] would wish to know of their daughter's pregnancy, and we may assume that most would seek to be supportive. (A.J.S. 9-10.)

The testimony of witnesses on both sides, excerpted in the margin, reinforces this view.[34]

[34] The plaintiffs' first expert witness, Dr. Sturgis, testified that in "most instances they, the parents, do go along with the doctor" (A. 65). He specifically stated he had never encountered parents who would refuse consent (A. 66). Nor had he known of minors who refused to involve their parents (A. 66). On cross-examination, Dr. Sturgis reiterated that every effort should be made to encourage parental cooperation and involvement (A. 95, 97-98).

Plaintiffs' other expert witness, Dr. Nadelson, substantiated the testimony of Dr. Sturgis. Dr. Nadelson stated:

> [I]t [parental involvement] is extremely helpful and we try very hard to get everybody, the entire family, involved if we can, as many people as can sit down together and talk about it. (A. 92.)

Upon cross-examination, Dr. Nadelson testified that:

> [I]t is very important for a minor to have parental support and somebody with her. It is a very important part of feeling loved and cared about, expecially if the pregnancy occurred in the context of some question about that, and I think it is an important part of building a relationship between teenagers and their parents or between any two people who have to go through a crisis together. It can really strengthen the relationship. (A. 180.)

The court below did not consider a second basis for parental involvement, that parents would want to arrange for their child's termination of pregnancy to take place under optimum medical conditions supplemented by professional counseling sensitive to the child's emotional needs. As one very pertinent illustration, some parents might be justly skeptical about the abortion process followed at the Parents Aid Society. The testimony at trial established that this process was a perfunctory one.

The counseling carried on by the Parents Aid Society occurs entirely on the day the abortion is to be performed (Mary Moe, 158). It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another (Mary Moe, 141). The physician takes no part in this counseling process (A. 229, 263). Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques (A. 263-264; Mary Moe, 141).

The abortion itself takes five to seven minutes (A. 231). The physician has no prior contact with the minor, and on the

Defendants' expert witness, Dr. Yerkes, explained that the abortion decision should be made over a period of at least a week in consultation with a doctor and the minor's parents (A. 339-340). He stated:

> The adolescent, depending upon age, lives in two worlds. One is a world of peers and one is a world of family. In terms of emotionally important people, the family are the oldest. They know the individual the best. They are the people I think should be primarily involved, if at all possible. I feel that the family involvement should be the rule for several reasons. (A. 340.)

As a corollary to this consensus that parental involvement is beneficial, all the witnesses with relevant experience testified further that a minor's fear of adverse parental reaction were usually unfounded. They agreed that once the parents were involved, they worked with the doctor and supported their daughter. A minor's fear of parental reprisals against her or her boyfriend seldom materialized (A. 65, 148, 182-183, 343).

days that abortions are being performed at the Parents Aid Society, the physician, Dr. Zupnick, may be performing abortions on many other adults and minors (A. 240). On busy days patients are scheduled in separate groups, consisting usually of five patients (A. 240). After the abortion Dr. Zupnick spends a brief period with the minor and others in the group in the recovery room (A. 240).

Parents might well determine that their child's needs would be served better by individual private counseling than by group counseling. Moreover, they might wish to seek the services of a doctor with whom they are familiar and to whom the family can return for information and assistance, should the need later arise.[35] With these medical and counseling preferences in mind, parents might reasonably utilize the consent provision in § 12P to direct their daughter to a facility that provides such services.[36] It is in this way that parental participation contributes a mature perspective which is likely to serve the child's physical and emotional needs following her abortion.[37]

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[35] The Court in *Roe* v. *Wade* recognized that a state may "properly assert important interests in safeguarding health [and] in maintaining medical standards." 410 U.S. at 154.

[36] Plaintiffs' own expert, Dr. Carol Nadelson, described a thoughtful and sensitive process provided at Beth Israel Hospital with elements of care and counseling lacking at the Parents Aid Society (A. 169-170, 181).

[37] As Judge Julian stated, in dissent below:

> Parents have rights and responsibilities that inhere in the parent-child relationship and stem from the fact, nature and purpose of parenthood. These rights and responsibilities are not inimical to the minor's rights and welfare. They exist for the benefit of the child and protection during the child's formative years. The state has a compelling interest in protecting the parental rights and duties against unauthorized intrusion by third persons. The statute under attack expresses this compelling interest. (A.J.S. 25.)

Further, parents can assure that their child appreciates all the options available to her. For example, a pregnant minor might initially reject the alternative of giving birth and then providing for the baby's adoption. It may be, however, that this choice would ameliorate the feelings of guilt many minors may later encounter from their decision to terminate pregnancy. At the least, parental counseling can minimize the possibility that the child will follow a path that mature reflection would put aside in favor of another course. A statute that preserves these opportunities for parental participation should not be rejected as facially invalid.

The Court has not had occasion to speak often about the place of the family in our constitutional system, but, when addressed, the primacy of the family unit has been made plain. For example, the Supreme Court has recognized that the values of the family are sufficiently strong in certain contexts to prevent a state from implementing a basic interest, the education of its youth. In *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), the Court overturned the criminal convictions of Amish parents who had refused, contrary to the state's compulsory education law, to send their children to public high school beyond the eighth grade. The Court stated:

> [T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the unbringing of their children is now established beyond debate as an enduring American tradition. 406 U.S. at 232.

In *Yoder* the "primary role of the parents" outweighed the state's basic interest in education.[38] This interest in the parental role is reflected in § 12P and should serve here not to condemn but justify state action. For unlike *Yoder* the Massachusetts Legislature, in enacting § 12P, claims no interest independent of or in conflict with the integrity of the family unit. Rather, it underscores these same family values as among the compelling interests the statute seeks to further. The court below neglected to consider the constitutional dimensions of the family concept and thus found it a deceptively simple matter to strike down the statute.

It is true that in *Yoder* the Court did not consider the potentially competing interests of parent and child. This possibility of conflict is a brooding issue in any judicial treatment of the family unit. In declining the issue the Court stated:

> Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. 406 U.S. at 231.

The Court presumed that the interests of parents and their children will be in harmony on fundamental questions. But the Court did imply that, were such conflict to exist, parental rights would remain strong. *Ibid.* Moreover, Justice Douglas recognized in his dissent that the appropriate resolution of

[38] See *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954): "Today, education is perhaps the most important function of state and local governments."

such conflict would lie *not* in the Supreme Court's prefering one family member over another, but in providing the child an opportunity to be heard. 406 U.S. at 244-246. The Massachusetts Legislature has afforded precisely this opportunity to pregnant minors in the judicial review provision of § 12P.[39]

In deciding *Stanley* v. *Illinois*, *supra*, and *Wisconsin* v. *Yoder*, *supra*, this Court relied upon three often-cited opinions for the principle that preservation of the family unit is a fundamental interest: *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

Prince v. *Massachusetts* provided what was, until this case, the richest context for considering family interests, for in *Prince* these interests collided directly with the state's responsibility for protecting its youth.[40] Moreover, the dispute involved the exercise of religious freedom. Massachusetts had enacted a child labor law prohibiting the sale of magazines and related materials by a minor. The Court affirmed the conviction under this statute of a guardian aunt who had permitted her niece to participate in the distribution of Jehovah's Witness materials. Citing *Pierce* and *Meyer*, Justice Rutledge began by declaring that parental rights carry great constitutional weight:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. . . . And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter. 321 U.S. at 166.

[39] See Part III, C, *infra*.

[40] See Part III, B, *infra*.

The Court went on, however, to hold that "the family itself is not beyond regulation in the public interest . . . [a]nd neither rights of religion nor rights of parenthood are beyond limitation." *Ibid.* The state's goal of protecting the well-being of its youth through child labor legislation outweighed the asserted private interest. Thus, *Prince* established that even fundamental constitutional interests are subject to carefully drawn state regulation. More recently, the Court in *Roe* v. *Wade* held that a woman's right to an abortion is subject to the same limitation. 410 U.S. at 154.

In this case, the statute seeks to further the interests of the family unit. At the same time its impact on the privacy interest of pregnant minors is not in the outcome of the abortion decision, but the process by which the decision is reached. This limited regulation is a narrowly drawn effort to serve compelling state interests and should be upheld.

B. *The Statute Furthers the State's Compelling Interest in Protecting the Well-Being of its Youth.*

In addition to the state's interest in assuring parental participation in the abortion decision, § 12P advances the well-recognized state interest in protecting the well-being of its youth. *Ginsberg* v. *New York*, 390 U.S. 629, 639 (1968). In this regard the Supreme Court has long held that "[t]he state's authority over children's activities is broader than over like actions of adults." *Prince* v. *Massachusetts*, 321 U.S. 158, 168 (1944). In so holding the Court in *Prince* stated:

> Concededly a statute or ordinance identical in terms with § 69 [prohibiting the sale of magazines by a minor], except that it is applicable to adults or all persons generally, would be invalid. . . . But the mere fact [that] a state could not wholly prohibit this form of adult activity

> . . . does not mean it cannot do so for children. . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection. . . . What may be wholly permissible for adults therefore may not be so for children. 321 U.S. at 167, 168, 169.

The rationales laid down in *Prince* are well-served by the Massachusetts statute. As in other areas of personal concern, the state may reasonably determine that a pregnant minor generally lacks the capacity to make a valid, informed judgment as to the appropriate course to pursue, especially when faced with the fact of her own pregnancy.[41] *See Ginsberg* v. *New York*, *supra*, 390 U.S. at 641-643.

Moreover, the nature of the state's regulation here is far more limited than in *Prince*. There, the Court upheld an outright prohibition on activities prompted by religious belief.[42] Here, process rather than prohibition is the focus. This attempt by the Massachusetts Legislature to strengthen the maturity of the abortion decision, while leaving intact the substantive fundamental interest of the child, deserves the Court's respect.

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[41] The testimony below pointed to the ambivalence minor females experience upon becoming aware that they are pregnant (A. 170).

On the rights of those minors actually capable of a valid consent, see the discussion of the statute's provision for judicial review, *infra*, p. 56.

[42] Justice Jackson, dissenting in *Prince*, pointed out that the Court had held the term before that precisely the same religious activity, sale of religious literature by Jehovah's Witnesses, occupies "the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits." 321 U.S. at 176, citing *Murdock* v. *Pennsylvania*, 319 U.S. 105, 109 (1943).

The Court's recent opinions upholding the constitutional rights of children do not support a contrary result. The three most notable opinions on this issue are *In re Gault*, 387 U.S. 1 (1967), *Tinker* v. *Des Moines Indep. School Dist.*, 393 U.S. 503 (1969), and *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1970).[43]

In re Gault concerned the impact of the due process requirement on "proceedings by which a determination is made as to whether a juvenile is a 'delinquent. . . .'" 387 U.S. at 13. In reiterating[44] that a juvenile hearing must measure up to the essentials of due process and fair treatment under the Fourteenth Amendment, the Court extended to juvenile proceedings a number of safeguards considered basic to criminal trials of adults. 387 U.S. at 31-59. In clear and simple terms, the Court stated:

> [N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone. 387 U.S. at 13.[45]

Appellants do not challenge this principle, nor do they suggest that it has any less force here than in *Gault*. Rather, appellants submit that this principle is compatible with the notion that the state, in regulating an area touching upon the fundamental interests of children, may take account of the well-recognized differences between minors and adults in their

[43] *See also Kent* v. *United States*, 383 U.S. 541 (1966); *In re Winship*, 397 U.S. 358 (1970); *cf. Goss* v. *Lopez*, 419 U.S. 565 (1975).

[44] *See Kent* v. *United States, supra*, decided the year before *Gault*.

[45] *See also McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971), in which the Court held that the Due Process Clause of the Fourteenth Amendment does not assure the right to trial by jury in the adjudicative phase of a state juvenile court delinquency proceeding.

capacity for autonomous decision-making. Justice Stewart emphasized this point in his concurring opinion in *Tinker* v. *Des Moines Indep. School Dist.*, *supra*. While agreeing that the First and Fourteenth Amendments precluded public school authorities from prohibiting the wearing of black armbands by students during school hours as an expression of opposition to the Vietnam War, he went on to state:

> I continue to hold the view I expressed in [*Ginsberg* v. *New York*, 390 U.S. 629 (1968)]: "[A] State may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." 393 U.S. at 515.[46]

Ginsberg v. *New York*, *supra*, reinforces appellants' argument that minors are subject to more restrictive regulation than adults in areas of constitutional concern. There the Court upheld the facial constitutionality of a New York obscenity statute which prohibited the sale to minors of material defined as obscene on the basis of its appeal to them although the same material could not be defined as obscene to adults.[47]

[46] This concurrence was cited with approval by the Court in *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 214, n. 11 (1975).

[47] Appellants recognize that, because the elusive concept of obscenity was under analysis in *Ginsberg* generalization to other areas of constitutional concern becomes a delicate task. Obscene material, once defined as such, loses the constitutionally protected status afforded other forms of speech. In *Ginsberg*, the written matter had protected status vis-a-vis adults, but lost that status when associated with minors. This calls into question whether in *Ginsberg* the child's fundamental interests were directly involved. Appellants submit that, whatever the resolution of this conceptual conundrum, the Court's primary theme in *Ginsberg*, the distinction between adults and minors, supports the analogy drawn in the text of the brief.

First quoting *Prince* v. *Massachusetts*, 321 U.S. 158, 170 (1944), to the effect that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults," *Ginsberg* at 638, the Court in *Ginsberg* went on to hold:

> The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations . . . upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. . . . The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. . . .
>
> The State also has an independent interest in the well-being of its youth. . . . "It is, therefore, altogether fitting and proper for a state to include in a statute designed to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults." [Quoting Fuld, J., in *People* v. *Kahan*, 15 N.Y. 2d 311, 206 N.E. 2d 333 (1965).] 390 U.S. at 639-640.[48]

[48] *See also* Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 939 (1963):

> Different factors come into play, also, where the interest at stake is the effect of erotic expression upon children. The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules. (Quoted in *Ginsberg*, 390 U.S. at 638.)

These same interests in protecting youth are reflected in § 12P. Taken together, the State's preservation of the child's well-being and its support of the family unit compel the conclusion that the statute is facially valid under the Fourteenth Amendment.

C. *Because the Statute's Provision for Judicial Review can be Administered to Preserve the Pregnant Minor's Independent Privacy Interest, the Lower Court's Finding of Facial Invalidity was Unwarranted.*

Appellants have taken as a tacit premise throughout their argument that the right of privacy, held in *Roe* v. *Wade*, 410 U.S. 113, 153 (1973), to be part of the Fourteenth Amendment, extends to minors as well as adults. *See In re Gault*, *supra*. However, as stated above, pp. 51-52, the minor's possession of a fundamental privacy interest does not foreclose narrowly drawn state regulations designed to serve compelling interests. Here, the State, by including a right of review, has paid heed to the need for careful draftmanship. If § 12P provided no recourse for a pregnant minor who found herself locked in dispute with her parents over the abortion decision, constitutional problems might exist.[49] For in that situation it might be argued that the statute categorically required that parental judgment be preferred to the privacy interest of minors. The court below apparently concluded that this categorical preference was a central feature of the law. Thus, the district court said:

[49] For example, contrast the parental consent statutes struck down in *State* v. *Koome*, 84 Wash. 2d 901, 530 P. 2d 260 (1975), *Poe* v. *Gerstein*, 517 F. 2d 787 (5th Cir. 1975) (Florida), *Foe* v. *Vanderhoof*, 389 F. Supp. 947 (D. Colo. 1975), none of which provides the minor an explicit opportunity to be heard in state court.

> The parents not only must be consulted, they are given a veto. Defendants do not like this word. The fact, however, that because of the right of appeal this veto may not be absolute, modifies it only to a degree. So long as parents' independent rights may be enforced, they remain formidable. (A.J.S. 15.)

This conclusion fails to analyze how the state courts may actually administer the statute. Standards of review have already been fashioned for similar disputes which, if applied here, would preserve the statute's constitutionality.

The judicial review provision reads as follows:

> If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

Reversal of the district court's findings of facial invalidity is warranted if this Court can realistically foresee an application of this provision that will bring § 12P within constitutional boundaries. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1975). As the Court has consistently held in the First Amendment area:

> Application of the overbreadth doctrine . . . is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has

> been or *could be* placed on the challenged statute.[50] (Emphasis supplied.) *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613 (1973). *See also Dombrowski* v. *Pfister*, 380 U.S. 479, 497 (1965).

Three considerations in this case related to narrow statutory construction militate in favor of reversal. First, the defendants in this proceeding are offering justifications for the statute predicated on a narrow construction. These defendants are the attorneys responsible for enforcement of the criminal laws of the Commonwealth, including § 12P. There is thus good reason for the Court to believe that, in its enforcement, the statute will be decisively narrowed. *See Erznoznik* v. *City of Jacksonville*, 422 U.S. at 217, *Grayned* v. *City of Rockford*, 408 U.S. 104, 111-112 (1972).

Second, the Massachusetts Supreme Judicial Court recently has made clear its solicitude for the privacy interest articulated in *Roe* v. *Wade*. In 1974 that court held that a woman's right to terminate her pregnancy was not subject to a countervailing right in the father to prevent the abortion. *Doe* v. *Doe*, Mass. Adv. Sh. (1974) 1089, 314 N.E. 2d 128 (1974). The court stated that it found "no basis for the husband's assertion that the Constitution enables him to summon the Commonwealth to help him in a dispute with his wife." 314

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[50] *Broadrick* also points out that:

> [O]verbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner. See *United States* v. *Harriss*, 347 U.S. 612, [625-626] (1954); *United States* v. *C.I.O.*, 335 U.S. 106 (1948). *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. at 614-615.

Appellants have argued elsewhere, pp. 41, n. 33, 48, 49, that § 12P does not "censor," but rather prescribes a process for the minor's abortion decision. Here, too, standards for facial scrutiny should be "less rigid."

N.E. 2d at 130. One can thus predict with some assurance that the Supreme Judicial Court will permit the statute to operate *only if* constitutional limits can be carved out of its terms. In these circumstances, a finding of facial invalidity is inappropriate. *See, e.g., Gooding* v. *Wilson*, 405 U.S. 518, 520-527 (1972).[51]

The third basis for a narrowing construction is the availability of common law standards in analogous areas which, if applied here, will assure that the child's privacy interest is given its proper weight. These standards are (1) the "mature minor" rule and (2) "the happiness and well-being of the child."

The mature minor rule represents a response by the common law to the fact that certain minors have sufficient capacity to appreciate the medical and emotional implications of surgical procedures. In these circumstances, the rationale for parental consent ceases, and state courts have given effect to the minors' decision. *See, e.g., Rappeport* v. *Stott*, Civil Action No. J 74-57 (Mass. Sup. J. Ct., Aug. 28, 1974) (unreported case). This rule should meet the objection of the district court that "a substantial number of females under the age of 18 are capable of forming a valid consent" (A.J.S. 12). These are the very females who may be able to use the rule to establish "good cause" for obtaining consent from the Superior Court in the face of parental objection.

The other standard designed to protect the child states that parental rights "will not be enforced to the detriment or

[51] *See also Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 500 (1941):

> Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies, [where] the policy relates to . . . the final authority of a state court to interpret doubtful regulatory laws of the state.

destruction of the happiness and well being of the child." *Purinton* v. *Jamrock*, 195 Mass. 187, 201, 80 N.E. 802, 805 (1907). This standard has deep roots in the common law and may well be absorbed into § 12P as the primary meaning of the term "good cause." Thus interpreted, the statute would permit the Superior Court to substitute its judgment for that of the parents if equity requires. See pp. 38-39, *supra*.

When a state statute that serves important interests provides an opportunity for a narrowing construction, the fundamental premises of our constitutional system demand that the Court stay its hand. As this Court has declared in a comparable context, such a result reinforces

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This . . . is referred to by many as "Our Federalism." . . . What the concept . . . represent[s] is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. *Younger* v. *Harris*, 401 U.S 37, 44 (1971).

The idea of federalism expressed in *Younger* involves more than a technical rule. It counsels an attitude of restraint for

federal judges.[51] Their solicitude for personal interests should be tempered by a recognition that others share this solicitude as well as the responsibility for protecting these same interests. To ignore the possibilities of a narrowing interpretation here would be tantamount to an "assumption that state judges will not be faithful to their . . . responsibilities" to abide by the Federal Constitution. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 611 (1975). These principles render inappropriate a finding of facial invalidity.

IV. Because the District Court Ignored the Requirements of Rules 17(c) and 19(a) of the Federal Rules of Civil Procedure, it Reached a Decision Uninformed by the Actual Views of Persons Significantly Affected by the Outcome.

A. *Fed. R. Civ. P. 19(a) Required the Joinder of Mary Moe's Parents.*

Fed. R. Civ. P. 19(a) provides that:

> (a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not

[51] For a listing of analogous situations calling for an attitude of restraint, *see Ashwander* v. *T.V.A.*, 297 U.S. 288, 347, 348 (1936) (Brandeis, J., concurring), e.g.:

> 4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . .
>
> 7. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. . . ."

> deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. . . .

This provision sets forth three criteria which, if satisfied, classify a person as one required for a just adjudication. First, the person must be subject to service of process. Second, the person's joinder must not divest the court of subject matter jurisdiction. Third, the person must either be essential to the provision of complete relief or claim an interest in the action which may be adversely affected as a practical matter or may prejudice the interests of persons already parties. Persons who are thus situated are, in traditional terms, "necessary" parties, and Rule 19(a) requires their joinder. *Smith* v. *American Federation of Musicians of the United States and Canada*, 46 F.R.D. 24, 28 (S.D. N.Y. 1968); *Muir* v. *United States Steel Corp.*, 41 F.R.D. 428, 430 (E.D. Pa. 1967); 7 C. Wright and A. Miller, Federal Practice and Procedure § 1604 (1972); 3A J. Moore, Federal Practice ¶19.19 (1974).

Mary Moe's parents clearly satisfied these three criteria.[53] The district court determined that Mary Moe was a resident of Massachusetts living at home with parents (A.J.S. 3). On this record, particularly in light of appellees' failure to provide the information required under Rule 19(c), it is reasonable to assume that the parents were subject to service of process. Further, their joinder would not have divested the court of subject matter jurisdiction, since jurisdiction was founded on 28 U.S.C. § 1343(3) and was therefore independent of the citizenship of the parties. Finally, the parents were unable to claim their interests because the proceedings were secret[54] and they were seriously and adversely affected by the district court's judgment.

Mary Moe's parents have the foremost interest in their child's health and welfare. This interest is recognized by both the Constitution and the common and statutory law of the Commonwealth. See pp. 25-32, *supra*. The district court, by failing to order joinder even after plaintiff Zupnick had performed an abortion on Mary Moe, effectively foreclosed her parents from taking any steps to express their own views on

[53] Appellants make this statement on the basis of supposition, since appellees did not comply with the requirements of Rule 19(c) and the true situation thus remains a secret. Federal courts have stated that supposition is appropriate to prevent plaintiffs from foreclosing argument under 19(c) on account of their own failure to provide the information Rule 19(c) requires. *See Stevens* v. *Loomis*, 334 F. 2d 775, 776 n. 1 (1st Cir. 1964) (court assumed truth of defendants' allegations concerning persons needed for just adjudication under pre-1966 version of Rule 19(a), absent plaintiffs' compliance with Rule 19(c)).

[54] The secrecy of the proceedings also prevented the parents from exercising their rights under Fed. R. Civ. P. 20 and 24. This complete foreclosure of the right to notice and an opportunity to be heard raises serious constitutional questions. *See* Julian, J., dissenting, A.J.S. 18-21; *cf. Joint Anti-Fascists Refugee Committee* v. *McGrath*, 341 U.S. 123, 161-174 (1951) (Frankfurter, J., concurring).

the issue under analysis. As a practical matter, Mary Moe's parents will never be able to question plaintiff Zupnick's actions, pursue him for damages should his care prove inadequate, or litigate the question of whether he had a duty under the common law to involve them in his activities.[55] Not only are Mary Moe's parents unaware that the district court compromised their interests, but should they ever discover that it has, practical problems of time, expense, and the unavailability of witnesses stand as virtual bars to the commencement of a future action to vindicate their rights.

The purpose of Rule 19(a) is to prevent such unnecessary frustration of an affected person's right to participate in judicial decision-making. *See Mallow* v. *Hinde*, 25 U.S. (12 Wheat.) 193, 198 (1827); *Shields* v. *Barrow*, 58 U.S. (17 How.) 130, 139 (1855); *Provident Tradesmens Bank and Trust Co.* v. *Patterson*, 390 U.S 102 (1968). The Rule embodies the basic principle that persons whose rights are affected by judicial action must be given notice and an opportunity to be heard. Reflecting the fundamental dimensions of this requirement, Rule 19(a) vests no discretion in a district court to refuse to order joinder of persons who satisfy its three criteria. Nowhere in the district court's opinion does it offer a justification of its refusal to follow the Rule.

B. *The District Court Abused its Discretion by Failing to Appoint a Guardian Ad Litem for Mary Moe under Fed. R. Civ. P. 17(c).*

The defendants requested the district court to appoint a *guardian ad litem* for Mary Moe I pursuant to Fed. R. Civ. P. 17(c). The Rule states:

[55] For example, the common law may require parental consultation at some point in the postoperative care process. *Cf. State* v. *Koome*, 84 Wash. 2d 901, 530 P. 2d 260 (1975) (state might constitutionally require parental *consultation*).

> The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

The majority refused defendants' request based upon the following finding:

> Mary Moe is of ample intelligence to, and in fact does, fully understand the nature of this action and has voluntarily participated therein. Her interests in the facial interpretation of and effect of the statute are fully represented by her competent counsel, and to the extent that there may be thought to be any conflicting interests, by the action of competent counsel for the intervening parent. (A.J.S. 3-4 n. 5.)

The findings of the majority failed to take into account the inherent potential for conflict among the parties and the need for an independent guardian to protect the interests of the minor.

The interests of plaintiffs Zupnick, Baird, and Parents Aid Society were in the continued performance of abortions, which would be curtailed by the enforcement of the statute. Each of these parties, directly or indirectly, obtained fees for the performance of abortions (A.J.S. 6, 22-23) and therefore have financial interests in the outcome of the litigation. In contrast, the interest of a pregnant minor, as represented by Mary Moe I, is not based upon financial gain or potential subjection to criminal penalties. Her interest lies in making a decision which will further her emotional and physical well-being. So long as there are sound alternatives to abortions

performed by the Parents Aid Society, there remains a serious conflict between Mary Moe and all the other plaintiffs.

Although the appointment of a *guardian ad litem* is not mandatory, the district court should decline to appoint one only after a judicial determination that the minor's interest will be protected without a guardian. *Roberts* v. *Ohio Casualty Ins. Co.*, 256 F. 2d 35, 39 (5th Cir. 1958). Moreover, counsel for a minor does not automatically qualify as a *guardian ad litem*. *Zaro* v. *Strauss*, 167 F. 2d 218, 220 (5th Cir. 1948). By relying on the counsel retained by the other plaintiffs, the majority improperly equated the role of legal representation with that of guardianship.

Other federal courts have recently taken a more sensitive approach to the need for a guardian. In *Noe* v. *True*, 507 F. 2d 9, 11-12 (6th Cir. 1974), involving the constitutionality of a state statute prohibiting the State Department of Human Resources from consenting to abortions of minors under its guardianship, the court stated:

> We hold that the district judge erred here in failing to consider and rule upon the guardian ad litem question. We deem the issue particularly critical in this case, where the legal issues are controversial in nature, the plaintiff is a minor, pregnant out of wedlock, without the benefit of a natural parent or guardian, and where her legal guardian is the defendant in the lawsuit. . . . Moreover, since the respective *legal* positions of the child and guardian are adverse in this lawsuit, it cannot be said that the plaintiff is "otherwise represented" in the action as provided in Rule 17(c). While it would not be at all improper for the court, upon consideration, to appoint the child's attorney as her guardian ad litem, the mere presence of an attorney representing her in the action is insufficient of itself to protect her personal interests in the

> action. We stress the obligation of the trial judge to exercise his discretion, bearing in mind the very real need of a 14-year-old plaintiff to have her own personal rights and interests protected. (Emphasis in opinion.)

Cf. Horacek v. *Exon*, 357 F. Supp. 71, 74 (D. Neb. 1973).[58]

The district court majority failed to consider that, when it is addressing complex and sensitive issues such as a minor's abortion, each interested person deserves both independent guidance and strong representation. "[A] court must rely on the parties' treatment of the facts and claims before it to develop its rules of law." *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 221 (1974). Such reliance becomes critical when, as here, important interests with far-reaching effects on family and society are at stake. *Cf. United States* v. *Johnson*, 319 U.S. 302, 304-305 (1943). The majority's refusal to involve Mary Moe's parents or to appoint a *guardian ad litem* disserved the judicial process by reducing the court's analysis to inadequately narrow dimensions.

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[58] The situation in *Foe* v. *Vanderhoof*, 389 F. Supp. 947 (D. Colo. 1975), which the majority cites as authority for refusing to appoint a *guardian ad litem*, presented considerations wholly lacking in the case of Mary Moe. There, the minor already had the assistance of her social worker and doctor. Moreover, the court appointed an independent obstetrician and psychiatrist to examine and counsel the pregnant minor. These elements were absent in this case.

Conclusion.

For the reasons presented above, the order of the district court should be reversed.

Respectfully submitted,

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Dated: January 9, 1976.

Supreme Court, U. S.
FILED
FEB 24 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-73, 75-109

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated, *Appellants in No. 75-73,*

JANE HUNERWADEL, for herself and all other similarly situated, *Appellant No. 75-109,*

v.

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated, *Appellees in Nos. 75-73 and 75-109.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-73, 75-109

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated, *Appellants in No. 75-73,*

JANE HUNERWADEL, for herself and all other similarly situated, *Appellant No. 75-109,*

v.

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated, *Appellees in Nos. 75-73 and 75-109.*

BRIEF OF APPELLEES

Appellees respectfully submit this brief in support of the decision of the three-judge district court, and ask that the judgment below be affirmed.

STATEMENT OF THE CASE

The statement by Appellees should be supplemented as follows:

A. Facts:

Mary Moe testified *in camera* before the three-judge federal court. At that time she was age sixteen and

lived at home with her parents and three other siblings. (Tr., 131, Dec. 31, 1974).[1] She was in the tenth grade (Tr. 145).

When Mary Moe first thought she was pregnant, she sought a pregnancy test at a health clinic in her home town. She had to wait 43 days, however, before such a test would be definitive. During that time, she considered the alternatives to an abortion such as continued pregnancy and/or adoption. (Tr. 133). She discussed these options with two of her girlfriends and her older sister. (Tr. 141).

Mary Moe made a carefully reasoned, sensitive decision not to inform her parents of the pregnancy and her planned abortion. As the District Court stated:

> "Her father had told her, in connection with the pregnancy of a contemporary friend, that if that happened to her he would evict her and kill her boy friend. . . . Her reasons for not informing her parents were in part apprehension of what might happen to her as a result of their learning she had had intercourse, in part the fear of what would happen to her boy friend, and in part the desire to spare her parents' feelings." *Baird* v. *Bellotti,* 393 F. Supp. at 850.

Mary Moe showed particular and respectful concern for her mother and father. She testified that her mother "would get very upset. . ." (Tr. 134), and "might have a breakdown. . . ." (Tr. 136). She also commendably "wanted to finish school," (Tr. 135) and did not want to be "kick[ed] out of the house. . . ."

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[1] All references to testimony by Mary Moe are to the impounded second transcript volume dated December 31, 1974, which is on file with the Court.

(Tr. 135). While she could have legally remained in attendance at high school, she understandably chose to avoid the well recognized "additional difficulties and continuing stigma of unwed motherhood. . ." *Roe* v. *Wade,* 410 U.S. 113, 153 (1973). Appellants produced no evidence that attending school while pregnant and unmarried could be beneficial to a sixteen year old young woman.

Appellants have not questioned the reasoning or sensitivity of Mary Moe in deciding to protect her parents from the knowledge of her pregnancy and abortion. Nor have Appellants suggested in any way that parental involvement might have added to the quality of her decision or her medical care. It was Mary Moe, not the State, who showed positive concern for harmonious preservation of the family unit. The District Court found that

> "she had made a considered decision, before she learned of her pregnancy, that in case of pregnancy she would seek to abort. . . . [*S*]*he was competent to make and effectuate that decision. . . . [S]he is fairly representative of a substantial class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent, and who do not wish to involve their parents.*" 393 F. Supp. at 850 (Emphasized supplied).

The women's health clinic provided Mary Moe with "different names of different places you could go. . . . [I]t was up to [her] to choose. . . ." (Tr. 136). They also gave her educational material on different methods of birth control and abortion. (Tr. 136). She had only $20 and borrowed $5 more from her sister. (Tr. 140). The health clinic listings of abortion centers gave

Parents Aid Society as "the only place that listed anything about financial trouble." (Tr. 140).

Parents Aid and Dr. Zupnick accepted Mary Moe as a patient for the $25 fee, reduced from the usual $150.[2] (A. 221).[3]

In addition to the informational material provided Mary Moe, she received about two hours of professional counseling at Parents Aid Society from a trained registered nurse, Marilyn Morrissey. (Tr. 140). This included a discussion of the abortion procedure, birth control, breast cancer, and related topics. (Tr. 141; A. 264). There was ample opportunity to ask questions. (Tr. 141). Previously, Mary Moe had received no sex education at school or in her home and had been unable to obtain contraceptives because she was under age 18. (Tr. 132, 146).

When Mary Moe first telephoned Ms. Morrissey, she was encouraged to tell her parents of the pregnancy if possible. (Tr. 143: "[I]f you can tell them, you probably should. . . ."). She chose not to do so for the reasons stated.

In view of the rapidly approaching effective date of the statute (November 1, 1974), Parents Aid Society and Dr. Zupnick scheduled Mary Moe for her abortion on the evening of October 31, 1974, rather than the following week as she had requested. (Tr. 138).

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[2] The regular practice of accepting patients for such sharply reduced fees, and Mary Moe for $25, is consistent with the non-profit structure of Parents Aid Society, Inc. Fifteen percent (15%) of the patients pay no fee. (A. 222). 393 F. Supp. at 851.

[3] "A" references are to the Joint Appendix on file with the Court.

Mary Moe had heard about the statute from a girlfriend and volunteered to be a plaintiff. (Tr. 138). She offered to "do" an affidavit. (Tr. 148). Her sworn statement was presented to the single district judge in support of the motion for a temporary restraining order. (*Id.*).

As scheduled, and after the order was granted, Mary Moe obtained her abortion. There were no complications. (Tr. 142). She had no bad dreams or depression following the procedure. (Tr. 167).

A child psychiatrist retained by Intervenors observed the *in camera* questioning of Mary Moe before the three-judge court. (Tr. 131). Significantly, he offered no testimony questioning her capacity to consent and to understand her actions. (A. 331-359). The District Court fully credited her testimony. 393 F. Supp. at 850 & nn.4-5.

The other plaintiffs also testified extensively and were supported by prominent expert witnesses.

William Baird, who earlier before this Court successfully challenged the Massachusetts birth control laws, see *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), is the director of Parents Aid Society, Inc. Baird claims standing because of the threat of prosecution as an aider, abettor, or accessory before the fact.

As the District Court noted, Baird "had been arrested without warning in connection with the Massachusetts birth control statute, so-called. . . . [He] had every reason to believe that they had only two alternatives—to continue their current activities and face immediate arrest, or to bring the present suit." 393 F. Supp. at 852. Previously, Massachusetts authorities went so far as to arrest an Ohio clergyman for merely

referring a woman to Massachusetts for an abortion.[4] Baird is much more overtly involved in pre-abortion counseling as director of an abortion center. His standing to sue is clear.[5] The probability of Baird's having been prosecuted for continuing his counseling activities is far greater than that expected by an out-of-state clergyman passing out telephone numbers to pregnant women. He has as much standing as Mary Moe or Dr. Zupnick, the co-appellees, or the theater manager in *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 217 n.16 (1975). The District Court found it unnecessary to resolve the dispute over Baird's standing. 393 F. Supp. at 851. Baird is a proper party in this appeal and views the issue as highly important to counselors, nurses, and auxiliary health personnel in view of the *Hare* and *Schflander* prosecutions. In light of his independent status as an Appellee he asks this Court for a definitive ruling.

Dr. Gerald Zupnick, principal operating physician at the Parents Aid Society Boston abortion center, testified to his practice and experience with first trimester abortions, and with minor patients.

It was uncontradicted that other abortion centers referred patients to Parents Aid Society, particularly "minors who do not have parental consent or patients

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[4] Commonwealth v. Hare, —— Mass. ——, 280 N.E.2d 138 (1972). A second clergyman was prosecuted on similar facts in *Commonwealth* v. *Schaflander,* —— Mass. ——, 279 N.E.2d 670 (1972). The accessory before the fact statutes are MASS. GEN. LAWS c. 272, § 19, & c. 274, § 2.

[5] The discussion in *Eisenstadt* v. *Baird* further supports this conclusion. 405 U.S. at 443-446. *Accord,* Doe v. Bolton, 410 U.S. 179, 188 (1973) (physician standing); Epperson v. Arkansas, 393 U.S. 97 (1968).

who do not have the usual fee. . . ." (A. 211). About 15% of the patients are treated free of charge. (A. 222).

Dr. Zupnick had not encountered any minors incapable of giving an informed consent. (A. 213). He thought this to be possible only in case of "mental retardation." (A. *Id.*). About 30% of the patients at Parents Aid are minors, and about one-half of those preferred not to inform their parents. (A. 228).

The bulk of Dr. Zupnick's testimony consisted of an explanation of what transpires during the four or five hours a patient is at the abortion center. He explained that

> "[m]ost often [the patient's reaction] is relief at the completion of the procedure and surprise as to the simplicity. . . ." (A. 216).

This was explained in part by the fact that "most younger patients do not have the usual stigmata of illegal abortion in their heads." (A. 218). Reactive guilt or hostility were "rare." (A. 216).

There was a 75% follow-up of patients by one of "several cooperating physicians" in the Boston area. (A. 217).

Appellants, as advocates, have attempted to portray the Parents Aid abortion center as an assembly line impersonal operation. The Record is to the contrary.

B. Expert Testimony:

In this case the District Court had the benefit of extensive expert testimony from several nationally prominent individuals. On some issues the three-judge court made findings; on others, for the purposes of

argument alone, defense contentions were accepted, because, "either way, our ultimate conclusions would be the same." 393 F. Supp. at 853.

It is Appellees' position, that while only minimally necessary, the constitutional facts of this case are open to scrutiny and review by this Court. This has been the practice in First Amendment cases. The Court has accorded privacy rights equal or greater stature. *See Griswold* v. *Connecticut,* 381 U.S. 479, 486 (1965).

As to Defendants' and Intervenors' experts, Dr. Jules Rivkind "[had] not performed abortions under any circumstances." (A. 322). He was the sole gynecological expert called by Appellants. The hospital at which he was chairman permitted no abortions, no sterilizations, and no use of birth control pills, except "for the control of gynecological problems." (A. 318). He had conducted no research and written no articles on abortion or adolescent pregnancy. (A. 320).

Dr. Rivkind admitted that "90% of the first trimester abortions in this country are performed outside of hospitals. . ." (A. 327), but still insisted that the procedure was unsafe.

In view of his admitted bias and limited background, Dr. Rivkind was unqualified to offer competent testimony concerning minors' access to elective abortion. He opposed such access categorically, did not support the policy on abortion of the American College of Obstetricians and Gynecologists, and was opposed to the position taken in *Roe* v. *Wade,* 410 U.S. 113 (1973).

Dr. Rivkind did not require parental consent for minors seeking treatment of V.D., because Pennsylvania state law did not require such consent. (A. 321).

Presumably he would follow a law or decision waiving parental consent in the abortion area also.

Defendants and Intervenors also called a child psychiatrist, Dr. Raymond Yerkes. He had conducted no studies and written no articles on the subject of adolescent pregnancy. (A. 345-346). Dr. Yerkes had dealt with only about 30 pregnant patients under age 18 in the last twelve years. (A. 345).

He thought that minors under age 18 could give an informed consent to V.D. treatment. (A. 347). Dr. Yerkes admitted that "some" unmarried minors when pregnant could rise to the responsibility of making their own life decisions. (*Id.*). Significantly, Dr. Yerkes admitted that 17 year olds who chose not to abort would need more professional support than those who obtained abortions. (A. 350). He agreed that "emotional support can be provided for a pregnant minor without requiring parental consent." (A. 352). He further admitted that the desirability of abortion for a minor "depends upon the individual circumstances of the patient and the family and the particular situation in life." (A. 355). Finally, Dr Yerkes acknowledged that

> "there is a sub-class of teenagers for whom the families either are not filling their role or for whom they already left their families. . . . [I]n this situation medical and mental health professionals have a certain responsibility to perform an emotionally supportive role." (A. 357).

In sum, the testimony for Appellees does not detract from but in fact supports Appellants. All parties admit that emotionally supportive parental involvement

should be encouraged if at all possible. It is destructive, however, to the family unit for the State to *compel* such involvement over the objection of physician and patient in every case. That is the objectionable quality of the statute in question. "[O]ne's experiences [and] one's exposure to the raw edges of human existence"[6] compel recognition of the fact that mniors and the family unit need protection from the disruption which might erupt from applying this statute.

Plaintiffs' experts had far more in-depth experience in the underlying matrix of facts and behavior pertinent to this case.

Dr. Somers H. Sturgis, professor emeritus in gynecology at Harvard Medical School was the gynecological consultant to the first Adolescent Clinic in the United States. (A. 49). He is "closely allied to a clinic in the neighborhood of Boston where legal abortions are done. . . ." (A. 57-58). About 10% of their patients are under 18. (A. 58).

Dr. Sturgis testified that:

> "[A]ge is no criterion of development and maturity. . . . [E]ach individual must be judged by the doctor . . . most qualified perhaps to judge the degree of maturity and responsibility as well as the medical need for help." (A. 57).

He stressed that unwanted pregnancy is a "social and emotional tragedy to an adult," but "even worse" and a "much more serious predicament" for a minor. (A. 52).

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[6] Roe v. Wade, 410 U.S. 113, 116 (1973).

Dr. Sturgis saw no medical reasons for denying abortions to persons under age 18.[7] He stated:

> "[A]t 16 a great majority of the girls certainly would be able to give an informed consent. But the age level is not what a doctor regards as the way to judge whether this individual or that individual should have responsibility for their medical treatment." (A. 60).

As to the minor patients' phychological reaction to an abortion, Dr. Sturgis stated: "[I]n the vast majority of cases the young people are tremendously relieved." (A. 62).

Dr. Jane E. Hodgson, associate professor at the University of Minnesota, a Mayo Clinic graduate, and the author of numerous leading studies on first trimester abortion, testified next. Dr. Hodgson supervised over 25,000 such abortions as Medical Director of Pre-Term in Washington, D.C. About 11% of those patients were under age 18.

Dr. Hodgson explained that minors have a greater need for abortions than adults because with term pregnancy "the risk of toxemia and premature labor, hemorrhage, Cesarean section, neo-natal mortality, even maternal mortality is much higher. . . ." (A. 75). She pointed out that "[t]eenage pregnancy is very disruptive in the family." (*Id.*)

As to the ability to understand the abortion procedure and given an informed consent, Dr. Hodgson observed:

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[7] Indeed, he stated: "[T]he younger the child the higher the risk with an unwanted pregnancy." (A. 16).

> "I don't think chronological age enters into the problem except the very immature or the sub-normal, mentally sub-normal individual." (A. 77)

She had found that "some 12-year olds will be more mature than 18-year olds." (A. 79). She had seen a 13-year old patient capable of giving an informed consent and a 19-year old who lacked such understanding and capacity. (A. 80).

Dr. Hodgson illustrated some of the types of situations in which parents should not be told of a teenage daughter's pregnancy:

> "Illness on the part of the parents . . . where patients are concerned over their father's coronory status or their mother's emotional illness, alcoholism, marital instability, instability in the home, marital discord." (A. 82).

She answered the charge of physician conflict of financial interest by pointing out that fees for prenatal care and delivery are usually higher than those for abortion. (A. 86).

The third Plaintiff expert was Dr. Carol Nadelson, assistant professor of psychiatry at Harvard Medical School. She had extensive experience for "several years" "evaluating pregnant teenagers." (A. 87).

Dr. Nadelson emphasized that a requirement of parental consent delays an abortion procedure and that this is hazardous to the patient, both medically and psychiatrically. (A. 88-89). She observed that parents of pregnant teenagers "often feel guilty and angry. They may feel punitive towards the child. . . ." (A. 90).

Most minors she evaluated who had abortions "felt relieved by it. They feel that they have done the right

thing and have a second chance often." (A. 90). Less than 1% have clinically significant guilt or experience regret. (*Id.*).

Dr. Nadelson's experience was that most 17-year olds can give an informed consent. She stated: "I think the difficult time is in the 11, 12 and 13-year olds that we see. It is much more time consuming and difficult for them to understand what it means." (A. 92). She had had particularly difficult cases, such as parents of a 13-year old who opposed an abortion on religious grounds. (*Id.*) She agreed with Dr. Hodgson that "one can find a 13-year old who is better able to make a desion than a 17-year old." (A. 176).

Asked whether parents are most suited to provide emotional support to a pregnant teenage daughter, Dr. Nadelson replied: "Some are and some are not." (A. 177). She explained that parents "may at times be the worst people that one could talk to because they are so upset." (A. 178).

Finally, it was also Dr. Nadelson's experience that she had encountered no one in the 12 to 17 year old group who could not give an informed consent. (A. 186). She knew of only one instance. In that case the patient was mentally retarded. (*Id.*).

In sum, the expert testimony strongly supported Appellees and the judgment of the three-judge court.

Medical and psychiatric data and literature are fully in accord with the above, as are the policy recommendations of major national organizations and the decisions of numerous other lower courts.

The 1975 study by the Alan Guttmacher Institute[8] concluded:

> "Of approximately 430,000 women under age 20 who were estimated to be in need of abortion services, only 244,000 are estimated to have obtained them, and 186,000 apparently were unable to secure legal abortions. In 1973, there were 215,800 out-of-wedlock births to women under age 20."

A very significant segment of the population, therefore, is affected by curbs on access to abortion for minors. The study by the National Academy of Sciences indicated that in 1973 some 30.2% of all abortions were performed on young women between ages 15-19.[9] Only 1.5% of all patients were under age 15.[10]

Continuance of unwanted teenage pregnancy has numerous adverse personal and social consequences, not the least of which is the "continuing stigma of unwed motherhood. . . ." *Roe* v. *Wade*, 410 U.S. 113, 153 (1973).

There is a higher suicide rate among pregnant young women under age 18.[11] A young woman unable to inform her parents finds herself in the pre-*Roe* v. *Wade* era

[8] Provisional Estimates of Abortion Need & Services In the Year Following the 1973 Supreme Court Decisions 9 (1975). Similar earlier figures led to the *Statement on Teenage Pregnancy* by the American College of Obstetricians and Gynecologists.

[9] Legalized Abortion and the Public Health 33, Fig. 6 (1975).

[10] *Id.* Undue focus on the problem of pregnant 14-year olds would distort the real statistical picture. Such instances are rare and are handled with great care by physicians, psychiatrists, and counselors as shown in the quoted expert testimony.

[11] Gabrielson, *et al.*, *Suicide Attempts In a Population Pregnant As Teen-agers*, 60 AM. J. PUB. HEALTH, 2289, 2297-98 (1970).

and may attempt to abort herself or seek out an underground non-medical abortionist at great risk to her life or health. (Testimony of Dr. Hodgson, A. 76).

If a teenager continues pregnancy both she and the eventual baby face greatly increased medical risks, as previously indicated.[12] This, and other aspects of the "problem of adolescent pregnancy" have been sufficient to invoke United Nations activity through the World Health Organization. *See* PREGNANCY AND ABORTION IN ADOLESCENCE, Tech. Rep. Series 583 (WHO, Geneva 1975).

It is against this background that the three-judge court made its determination.

C. Findings of the District Court:

First, the three-judge court upheld the class action nature of this litigation, holding:

> "We find that Mary Moe, Parents Air Society, Inc., and Gerald Zupnick have standing, as representative party plaintiffs, and Jane Hunerwadel as intervenor. . . . [T]hey have a strong personal interest and are competently and vigorously represented by legal counsel, and we certify this as a valid class action as to all." 393 F. Supp. at 852.

As to medical facts the District Court found that an abortion in the first trimester does not impose "any greater risks for minors than for adults." 393 F. Supp. at 853.

The District Court found that parental support is desirable in general but that "an appreciable number

[12] *See also* Legalized Abortion and the Public Health 41, 60-62 (1975); Russell, *Sexual Activity and its Consequences in the Teenager*, 1 CLINICS IN OBSTETRICS AND GYNECOLOGY 683 (1974); Hodgson, *Teenage Mothers*, MINNESOTA MEDICINE 49 (Jan. 1972).

[of parents] are not [supportive] for a variety of reasons." 393 F. Supp. at 853. Also, "parents may seek to control sexual behavior by threats that they do not mean, or would not carry out . . . but which nonetheless serve to destroy intercommunication." 393 F. Supp. at 853.

Significantly, the District Court held:

> "We *must find*, however, that a significant number of minors who are capable of consenting are unwilling to tell their parents, either because they correctly fear what would happen to themselves, or, although they would expect support from their parents in one sense, they know their parents would under no circumstances consent to the abortion they wish, or, because of their views on illegitimacy and the stigma attaching to unmarried mothers, would attempt to make them enter into a marriage they do not want." 393 F. Supp. at 853 (Emphasis supplied).

The evidence on this point was overwhelming. It supports the view of Appellees that a statute requiring consent of one parent, or consultation with a parent, or notice to a parent, would invade the patient's privacy as much as the one at issue here.

The three-judge court further found that:

> "There are also minors who, understandably, do not wish to have their parents know of their condition because of the distress that it would cause them. . . ." 393 F. Supp. at 853.

The District Court "accept[ed] the testimony of plaintiffs' experienced expert[s] that some parents would insist upon the continuance of the pregnancy simply as a punishment, or to teach a lesson." 393 F. Supp. at 854.

Also, the court found as "fact that many parents believe with total sincerity that abortion is morally impermissible, either under all circumstances or unless to save the life of the pregnant woman." 393 F. Supp. at 854.

On the capacity of minors, the District Court held:

> "[A] substantial number of females under the age of 18 are capable of forming a valid consent." 393 F. Supp. at 855.

The above findings, supplemented and supported by the evidence summarized above, warrant a judgment affirming the three-judge court.

ARGUMENT

I.

The Double Parental Consent Provision of the Massachusetts Abortion Law, Mass. Gen. Laws, c. 112, § 12P, Invades a Pregnant Minor Woman's Individual Fourteenth Amendment Right of Privacy by Permitting Either Parent, for any Reason or No Reason at all, to Veto Her Access to Necessary Medical Care, Regardless of Rape, Incest, Her Medical Needs, or Personal Maturity

A. THE STATUTE:

The Legislation in question expressly requires consent from *both* parents before an *unmarried* minor may obtain an abortion. Its language, for the convenience of the Court is set out as follows:

> MASS. GEN. LAWS, c. 112—
>
> Section 12P:
>
> "(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, con-

sent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother."

"If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian, or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient."

"(2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent file."

"Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R."

Section 12Q:

"Any person who commits an act in violation of sections twelve L or twelve M shall be punished by a fine or not less than five hundred dollars nor more than two thousand dollars, or by imprisonment of not less than three months nor more than five years, or by both said fine and imprisonment. Conduct which violates sections twelve L or twelve M which also violates any other criminal laws of the commonwealth, may be punished either under this section or under such other applicable criminal laws. Any person who wilfully violates the provisions of sections twelve N or twelve O shall be punished by a fine of not less than one hundred dollars nor more than two thousand dollars."

Section 12R:

"The attorney general or any person whose consent is required either pursuant to section twelve P or under common law, may petition the superior court for an order enjoining the performance of any abortion that may be performed contrary to the provisions of sections twelve I through twelve Q."

Section 12N:

"Except in an emergency requiring immediate action no abortion may be performed under sections twelve I or twelve J unless

(1) the written informed consent of the proper person or persons has been delivered to the physician performing the abortion as set forth in section twelve P and

(2) if the abortion is during or after the thirteenth week of pregnancy it is performed in a hospital duly authorized to provide facilities for general surgery."

"Except in an emergency requiring immediate action no abortion may be performed under section twelve J unless performed in a hospital duly authorized to provide facilities for obstetrical services."

Massachusetts has more recently enacted a minor's consent for medical care bill which does not amend or alter the above.[13] That bill permits minors to consent

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[13] MASS. GEN LAWS, c. 112:

"Section 12F. No physician or hospital shall be held liable for damages for failure to obtain consent of a parent, legal guardian, or other person having custody or control of a minor child, or of the spouse of a patient, to emergency examination and treatment, including blood transfusions, when delay in

for any medical or dental care if already a parent, and/or if pregnant or possibly pregnant. However, abortion is expressly excluded from the new statute. In

treatment will endanger the life, limb, or mental well-being of the patient."

"Section 12H. (a) Any minor may give consent to his medical or dental care at the time such care is sought if

(i) he is married, widowed, divorced; or

(ii) he is the parent of a child, in which case he may also give consent to medical or dental care of the child; or

(iii) he is a member of any of the armed forces; or

(iv) she is pregnant or believes herself to be pregnant; or

(v) he is living separate and apart from his parent or legal guardian, and is managing his own financial affairs; or

(vi) he reasonably believes himself to be suffering from or to have come in contact with any disease deemed to be dangerous to the public health as defined pursuant to section six of chapter one hundred and eleven; provided, however, that such minor may only consent to care which relates to the diagnosis or treatment of such disease."

"Consent may not be granted under subparagraphs (ii) through (vi), inclusive, for abortion or sterilization."

"Consent given under this section shall not be subject to later disaffirmance because of minority. The consent of the parent or legal guardian shall not be required to authorize such care and, notwithstanding any other provisions of law, such parent or legal guardian shall not be liable for the payment for any care rendered pursuant to this section unless such parent or legal guardian has expressly agreed to pay for such care."

"(b) No physician or dentist, nor any hospital, clinic or infirmary shall be liable, civilly and criminally, for not obtaining the consent of the parent or legal guardian to render medical or dental care to a minor, if at the time such care was rendered, such persons or facilities:

(i) relied in good faith upon the representations of such minor to be legally able to consent to such treatment under paragraph (a); or

(ii) relied in good faith upon the representations of such minor to be over eighteen years of age."

"(c) All information and records kept in connection with the medical or dental care of a minor who consents thereto in accordance with paragraph (a) shall be confidential between the minor and the physician or dentist, and shall not be released except upon the written consent of the minor or a proper judicial order. When the physician or dentist attending the minor reasonably believes the condition of said minor to be so serious that he is in danger of life or limb, he may notify the parents, legal guardian or foster parents of said condition and shall inform the minor of said notification."

other words, a pregnant minor in Massachusetts may consent to any form of medical care except abortion.[14] This heightens the discrimination and totally undermines the rationale advanced by the Commonwealth and the Intervenors.[15] A 12-year old may now consent to a Cesarean section but not an abortion. It may be that a minor under the new law could obtain contraceptives if possibly pregnant but not an abortion when the contraceptive fails.

B. Decision of the District Court

After reviewing the evidence and making findings, the three-judge court turned to prior decisions from this Court.

The majority opinion by Senior Circuit Judge Aldrich noted that *Roe* v. *Wade*, 410 U.S. 113, 165 n.67

[14] Sterilization is also excepted by Mass. Gen. Laws c. 112, § 12H.

[15] Other "age lines" drawn in Massachusetts law cast no particular light on this case, although "it is singular for the state to provide that a minor may consent to intercourse at age 16, Mass. G.L. c. 265, § 23 (statutory rape), but cannot consent to [abortion] until she is two years older." 393 F. Supp. at 855.

Males at age 14 and females at age 12 may marry. Mass. Gen. Laws c. 207 § 9. This hardly shows maturity, but it permits the giving of a legal consent, that is not void. Normally consent of one parent is required before age 18. *Id.* § 7.

Any minor above age 12 must consent to his/her own adoption. A minor parent of any age may consent to adoption of his/her child. Mass. Gen Laws c. 210, § 2.

Minors between ages 14 and 17 may be tried for criminal offenses as adults. Mass. Gen. Laws c. 119, § 61.

(1973), expressly left open the question of parental rights, if any. However, *Roe* "in no way suggested that a minor lacked personal rights." 393 F. Supp. at 856. Other cases such as *In re Gault*, 387 U.S. 1, 13 (1967), moreover, recognized that "neither the Fourteenth Amendment nor the Bill or Rights is for adults alone." 393 F. Supp at 856.

Ginsberg v. *New York*, 390 U.S. 629, 638 (1968), and *Prince* v. *Massachusetts*, 321 U.S. 158, 168 (1944), were distinguished because "the [parental consent] statute is cast not in terms of protecting the minor . . . but in recognizing independent rights of parents." 393 F. Supp. at 856.

In discussing the extent to which parents may have rights in this context, Judge Aldrich stated:

> "[P]arents have years in which to teach their children, counsel them, and guide them. We may wonder how much would be accomplished by compulsorily affording a parent an eleventh hour opportunity. . . ." 393 F. Supp. at 856

The District Court added:

> "And we may wonder, also, whether imposing such burden on the minor would necessarily improve the family relationship. . . . The parents not only must be consulted, they are given a veto. Defendants do not like this word." 393 F. Supp. at 856.

No persuasive reasons were offered for this "right to be a grandparent." As the three-judge court stated:

> "It is not they who have to bear the child. Once born, the minor, and not they, will be responsible for it in all senses, financially and otherwise. It is difficult to think of any self

> interest that a parent would have that compares with those significant interests of the pregnant minor." 393 F. Supp. at 856.

The three-judge court opinion then returned to the subject of further precedent cited by Appellants. Judge Aldrich concluded:

> "[T]he cases cited by defendants and intervenor involving rights of parents uniformly concern situations where the parents' claimed rights are compatible with the minor's, not adverse. Such cases are of no assistance." 393 F. Supp. at 856.

Assuming *arguendo* that parents had "rights of a constitutional dimension vis-á-vis their child" the District Court "would find that in the present area the individual rights of the minor outweigh the rights of the parents, and must be protected." 393 F. Supp. at 857.

Judgment was accordingly entered "permanently enjoining defendants from enforcing Chapter 112, Section 12P, as it relates to parental consent in any fashion." 393 F. Supp. at 857.

C. Common Law and Statutory Sanction of Minors' Contracts for Necessities Including Medical Care

There is much myth in the legal literature and Appellants' briefs about the common law.[16] There is even language which shows reverence for the "non-person" status allegedly accorded to minors, women,

[16] It is apparently the position of both Appellants that the common law did not allow minors to contract for medical services. *Brief for the Appellants, pp.* 25-27; *Brief for the Intervenor,* pp. 15-16.

and slaves in those times. Appellees respectfully contend, however, that the common law has since the 1600's recognized a right in minors to contract for necessities, including medical care: that statutory law in Massachusetts and elsewhere recognizes the obligation of parents to provide medical care for their children, and that Appellees' position is in line with over 300 years of law, tradition, and reason.

The earliest common law decision found by Appellees is *Dale* v. *Copping,* 1 Bulst. 39, 80 Eng. Rep. 743 (K.B. 1610), before the Court of King's Bench. Justice Williams viewed the case as one of first impression. ("There is no book case in this . . . ."). It was an action for money due against a minor who had promised to pay for being cured of "falling sickness" (epilepsy).[17] The minor pleaded non-age as a bar to the action. This plea was overruled, the court stating:

> "Clearly the action well lieth against the defendant, and the non-age . . . is not material, for that this to be taken as a contract . . . for a thing in the nature of necessity to be done for him, and the same as necessary as . . . meat, drink, or apparel . . . the reason of the law being the same, and this cure being of as great necessity for him, as any of the other . . ." *Dale* v. *Copping,* 1 Bulst. 39, 80 Eng. Rep. 743 (K.B. 1610).

Eighty years later, in 1690, the Court of Kings Bench again held a minor patient liable for payment after medical care. In this case, *Huggins* v. *Wiseman,* Carth. 110, 90 Eng. Rep. 669 (K.B. 1690), an assumpsit action was brought for "labour and medicines in curing the defendant of a distemper . . . ." The plea of infancy

[17] COLUMBIA ENCYCLOPEDIA 664 (3rd ed. 1968).

was rejected because the contract "was for necessaries . . . ."

While *Dale, Huggins,* and like cases pertained to contracts, not alleged technical battery, there were no counterclaims asserting battery. It would be illogical to allow suit on a contract to perform a battery.[18]

Early Massachusetts cases follow this common law approach.

An 1886 decision, *Trainer* v. *Trumbull,* 141 Mass. 527, 6 N.E. 761 (1886), upheld a suit against a minor for " 'board, washing, doctor's bills, medicine, care, books,' etc." 141 Mass. at 527. The Massachusetts Supreme Judicial Court answered in the affirmative the question "whether the [matters] furnished to the defendant [minor] were necessaries for which he should be held responsible." 141 Mass. at 530. The Court stated that such items "fall clearly within the class of necessaries." 141 Mass. at 531.

The basic rule, stated in *Bradford* v. *French,* 110 Mass. 365, 366 (1872),[19] was and is:

> "The limits of the legal capacity of infants to act in their own behalf have been established by the law for their protection, *not to defeat the enforcement of their rights.* Contracts made and acts done by an infant, which are necessarily

[18] Copies of the *Dale* and *Huggins* decisions were provided to the District Court and opposing counsel during the trial below.

[19] The *Bradford* case itself upheld a replevin action by a minor in connection with a mortgage agreement he entered into. The Court also noted that a minor could give a valid bond and be liable for costs when a party in litigation. 110 Mass. at 367.

beneficial to him [her] are valid." (Emphasis supplied).

Other Massachusetts decisions are in accord. [20]

A corollary to the right of minors to contract for necessaries is the obligation of parents to provide the same. There have, indeed, been many criminal prosecutions of parents for failure to provide medical care. *See, e.g., R.* v. *Downs,* [1875] 1 Q.B. 25; *R.* v. *Senior,* [1899] 1 Q.B. 283; *Oakey* v. *Jackson,* [1914] 1 K.B. 216.

Cases relied upon by Appellants for their view of the common law all recognize that minors may and must give an informed consent, independent of the parents, for medical care, and such care must be beneficial.

Reddington v. *Clayman,* 334 Mass. 244, 134 N.E.2d 920, 922 (1956), involved a tonsillectomy & adenoidectomy in which the surgeon additionally removed the minor's uvulva (palate). Both parents and minor were held to have an action for exceeding the scope of authorized consent. 134 N.E.2d at 922. There was no suggestion that the surgeon could have operated without the minor patient's independent consent, nor that

[20] *E.g.,* Stone v. Dennison, 30 Mass. (13 Pick.) 1, 6 (1832) (a 14-year-old may validly agree to labor in exchange for necessaries); Swift v. Bennett, 64 Mass. (10 Cush.) 436, 438 (1852) (minor liable to third party who advanced sums to provide whaling gear); Dellamano v. Francis, 308 Mass. 502, 33 N.E.2d 327 (1941) (minor may sue hairdresser for breach of contract where hair burned); Wiley v. Fuller, 310 Mass. 597, 39 N.E.2d 418 (1942) ("[M]edical services furnished to a minor upon his [/her] own credit may be a necessary . . . ").

See also Sikes v. Johnson, 16 Mass. 389 (1820) (a minor may be responsible for civil trespass); Dow v. Lipsitz, 283 Mass. 132, 185 N.E. 921 (1933) (a minor may be guilty of gross negligence).

the parents might have been permitted to veto the minor's consent to the operation. *Reddington* simply does not speak to the issues in this case.

Similarly, *Bonner* v. *Moran,* 126 F.2d 121 (D.C. Cir. 1941), involved a skin graft taken from a 15 year old for the benefit not of himself but of another. The *Bonner* court recognized that that "where the child is close to maturity" the surgeon may be justified [but] "the basic consideration is whether the proposed operation is for the benefit of the child. . . ." 126 F.2d at 123.

While abortion is not necessarily the best solution to every unwanted teenage pregnancy, the testimony showed that in a great many instances both physician and patient will agree the procedure should be done.

Appellants also cite *Canterbury* v. *Spence,* 464 F.2d 772 (D.C. Cir.), *cert. denied,* 409 U.S. 1064 (1972), as an "action based upon failure of surgeon to secure informed consent of minor's mother." *Brief of Appellants,* p.26. A review of the very lengthy opinion shows that it was a straightforward informed consent case. It was brought by a 19-year-old patient, who along with his mother signed consents, but alleged insufficient disclosure of risk. No contention regarding minority was made. The mother was not even a party to the litigation.

Similarly, Appellants cite *Ballard* v. *Anderson,* 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal Rptr. 1 (1971), as a traditional parental consent case. To the contrary, *Ballard* was the landmark California case which held, on statutory grounds, "that minors may obtain therapeutic abortions under law without the necessity of parental consent." 4 Cal. 3d at 878, 95 Cal. Rptr at 4

Pertinent to this case *Ballard* observed:

> "[A]n unmarried pregnant minor understandably might be reluctant to seek parental consent. . . . [T]he parents of such a minor might refuse consent for reasons unrelated to the health of the minor." 4 Cal. 3d at 880, 95 Cal. Rptr. at 6.

Further, the *Ballard* court held:

> "There is no rational basis for discriminatorily singling out therapeutic abortion as the only type of pregnancy-related surgical care which requires parental consent." 4 Cal. 3d at 883, 95 Cal. Rptr. at 8.[22]

The Supreme Court of California took the same position urged by Appellees: "[T]he minor must be of sufficient maturity to give an *informed consent* to any treatment procedure." 4 Cal. 3d at 883, 95 Cal. Rptr. at 8 (Emphasis in original).

The *age* of consent is another matter in which common law history is instructive. All experts testified that there was no magic in the 18th birthday.

Historical scholars have pointed out that "[t]he reason why twenty-one was selected as the crucial age for majority appeared to depend upon the ancient rules of tenure." James, *The Age of Majority,* 4 AM. J. LEGAL HISTORY 22, 23 (1960). Previously, "Gothic kings seem frequently to have come of age at fifteen, for example Childebert II in 585 A.D." *Id.* at 22.

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[21] CALIF. CIVIL CODE § 34.5.

[22] By the same reasoning, the new Massachusetts statute on consent, MASS. GEN. LAWS c. 112, § 12H(4), note 13, *supra,* allows a pregnant minor to consent to any form of medical care *except* abortion.

Borough customs in England showed "a tendency to vary the age of majority needed according to the particular act. . . ." *Id* at 23 It appears that "at one time between the ninth and tenth century, fifteen was . . . the age of majority in England. . . ." *Id* at 26. It was arguably raised to 21 "due to the increase in the weight of arms." *Id.*

In modern America the age is again being lowered, particularly as regards medical care. Increased public education of minors and modern findings in clinical psychology may be responsible, and are certainly more rational than the practices of feudal sovereigns.

The point of the above is clear. The common law and history reveal no compelling state interest in preventing minors from contracting for necessities, including medical care. To the contrary, whenever presented with the question in the context of state civil lawsuits, Massachusetts courts and others uphold the rights of minors to contract for necessary services and goods. The ruling of the District Court, accordingly, rests on a sound and settled base.

D. DECISIONS BY THIS COURT ON THE FUNDAMENTAL CONSTITUTIONAL RIGHTS OF MINORS

By its terms, the Fourteenth Amendment embraces the rights of minors as much as adults. The Amendment, for example, defines citizenship as being conferred upon those "born or naturalized" in the United States, not just adults.

Case law, also, repeatedly applies the First, Fourth, Fifth, Sixth, and Fourteenth Amendments, and numerous clauses therein, to secure rights for minors.

The First Amendment guarantee against laws "respecting an establishment of religion" has been successfully invoked by school children to bar compulsory prayers. *See Engel* v. *Vitale,* 370 U.S. 421 (1962) Neither *Engel* nor the many other school-prayer and Bible-verse decisions suggest that the minor's right to be protected from government imposed religion could be waived or vetoed by a parent, and backed up by state criminal sanctions. Indeed, the presence of a minor with standing to sue was held absolutely indispensable to a similar prayer case in *Doremus* v. *Board of Education,* 342 U.S. 429 (1952). *See also School District of Abington Township* v. *Schempp,* 374 U.S. 203 (1963).

First Amendment free speech rights have similarly been held available to minors and school children. *Tinker* v. *Des Moines Indep. Community School Dist.,* 393 U.S. 503 (1969. A majority of this Court held in *Tinker*:

> "School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect. . . ." 393 U.S. at 511.

In no way did the Court suggest that the First Amendment protected only those students whose parents shared their views.

As *Prince* v. *Massachusetts,* 321 U.S. 158, 170 (1944), aptly pointed out:

> "Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children. . . ."

Decisions such as *Tinker* have a history going back more than fifty years, to the landmark decision of *Meyer* v. *Nebraska,* 262 U.S. 390 (1923). *Meyer* struck down a state law which forbad the teaching of modern foreign languages in all states schools, public or private. Rights of "a child of ten years," 262 U.S. at 396, were at issue, encompassing the rights "of pupils to acquire knowledge," 262 U.S. at 401, which were aspects of "liberty" secured by the Fourteenth Amendment.

More recently, *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972), touched the issues of religious freedom and possible state coercion of minors and their parents. Minors of the Amish faith, aged 14 and 15, were tangentially involved in *Yoder.* 206 U.S. at 207 n.1. Their parents were prosecuted for violating the Wisconsin state compulsory education law. This Court upheld "[parental] rights and the right of *their* children, to the free exercise of the religious beliefs they and their forebears have adhered to for almost three centuries."[23] 406 U.S. at 215 (Emphasis added).

Evidence in *Yoder* showed that "compulsory high school attendance could . . . result in great psychological harm to Amish children." 406 U.S. at 212 Here, as in *Yoder,* Appellees "have introduced persuasive evidence undermining the arguments the State has advanced to support its claim in terms of the welfare of the child and society as a whole." 406 U.S. at 234.

Yoder, in effect, involved a state effort to impose "an additional one or two years of compulsory high school education [on] Amish children." 406 U.S. at 224.

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[23] Justice Stewart, in a concurring opinion stressed that a different issue would be presented if "the religious beliefs of the [minors] . . . differ[ed] in any way from those of their parents." 406 U.S. at 237; *see also* 406 U.S. at 241-246.

In the present case a pregnant minor is threatened with compulsory childbirth and parenthood.

Ginsberg v. *New York,* 390 U.S. 629 (1968), and *Prince* v. *Massachusetts,* 321 U.S. 158 (1944), are the only cases in which this Court has not fully or substantially upheld First Amendment claims made on behalf of or by minors.

Ginsberg, the minors' obscenity case, is heavily relied on by both Appellants and Intervenors. The case in fact supports Appellees.

In the first place, *Ginsberg* reiterated the holding of *Roth* v. *United States,* 354 U.S. 476 (1957), that "[o]bscenity is not within the area of protected speech or press." 390 U.S. at 634. Here, however, Appellees assert the right of privacy recognized in *Roe* v. *Wade,* 410 U.S. 113 (1973), which has constitutional antecedents dating back to the 1891 decision in *Union Pac. R. Co.* v. *Botsford,* 141 U.S. 250, 251 (1891). The rights asserted by Appellees are fully within the area of constitutionally protected privacy. As the Court stated in *Griswold* v. *Connecticut,* 381 U.S. 479, 486 (1965): "We deal with a right of privacy older than the Bill of Rights. . . ."

In *Ginsburg* there was "no argument that the magazines are not 'harmful to minors. . .' " 390 U.S. at 635. Here the very opposite applies. No one seriously contends that abortions are harmful to minors.[24] Indeed, the denial of an abortion to a minor can be a disaster which lasts throughout her lifetime.

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[24] Appellees do not suggest however, that any person old enough to become pregnant may ipso facto consent to an abortion. Our position is not so broad. We do not make the mistake of overreaching as was done in *Ginsberg* v. *New York,* 390 U.S. 629, 636 (1968).

Subsequent cases distinguish *Ginsberg* and emphasize that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors]." *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205, 213 (1975).

We may concede *arguendo* that "the power of the state to control the conduct of Children reaches beyond the scope of its authority over adults. . ." *Prince* v. *Massachusetts,* 321 U.S. 158, 170 (1944). It is one thing, however, to stop a nine year old from selling religious propaganda at night and quite another matter to force a pregnant sixteen year old to become a seventeen year old mother because her own mother wants a grandchild.

While the *Engel-Tinker-Meyer* line and related cases concentrated on substantive constitutional rights, *Brown* v. *Board of Education,* 347 U.S. 483 (1954), spawned a line of decisions barring discrimination against minors, not only in access to education, but also in numerous respects where neither race nor education was an issue. Indeed, fourteen years after *Brown,* the Court was to hold:

> "[I]llegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." *Levy* v. *Louisiana,* 391 U.S. 68, 70 (1968).

If illegitimate children, regardless of age, are "persons" under the Fourteenth Amendment, unmarried pregnant minors should have comparable constitutional status.

In virtually all spheres of litigation the minor person has received the protection and benefits of the Bill of

Rights. Nowhere has this been more consistently the case than with respect to the rights of minors accused of juvenile offenses.

In re Gault, 387 U.S. 1 (1967), was the fountainhead of juvenile rights in offender proceedings.[25] The case pointedly held:

> "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." 387 U.S. at 13.

Gault applied the procedural constitutional rights to notice, confrontation, cross-examination, and the privilege against self-incrimination to minors in juvenile proceedings. The Court has often reaffirmed *Gault,* recognizing the right to insist that proof be beyond a reasonable doubt, *In re Winship,* 397 U.S. 358 (1970), and protection from twice being placed in jeopardy. *Breed* v. *Jones,* 421 U.S. 519 (1975) (Burger, C.J.). Only *McKeiver* v. *Pennsylvania,* 403 U.S. 528 (1971), points the other way, primarily because a right to jury trial was not deemed necessary to fundamental fairness.

Whatever may be said of *Gault* and its progeny, no one would suggest that both parents of a juvenile should have the right to control his defense and veto his exercise of any rights there recognized.

In sum, a substantial body of case law acknowledges the fact that the Bill of Rights is not marked "adults only." With respect to freedom of religion, free speech, freedom from invidious discrimination, and fundamental fairness in juvenile offender proceedings, a minor is protected by the Bill of Rights, and not excluded as a "non-person."

[25] For earlier cases extending constitutional rights in criminal trials to minors, see *Haley* v. *Ohio,* 332 U.S. 596 (1948), *Gallegos* v. *Colorado,* 370 U.S. 49 (1962) and *Kent* v. *United States,* 383 U.S. 541 (1966).

The cases and language of the Constitution support this approach to the protection of fundamental personal rights in general. Indeed, the reasons behind the Bill of Rights have very little to do with chronological age. Similarly, a young woman's need for medical care to terminate pregnancy is also wholly unrelated to age.

E. Application of *Roe* v. *Wade* and *Doe* v. *Bolton* to this Case:

Roe v. *Wade* and *Doe* v *Bolton* expressly declined to intimate any view on the constitutionality of state laws bestowing rights on the parents of a pregnant minor. 410 U.S. at 165, n.67. The issue is squarely presented here, however.

A fair reading of the language and reasoning of *Roe* and *Doe* adds plain support to Appellees. Appellants have certainly not suggested that *Roe* and *Doe* are supportive to them.

Following the *Roe* opinion, it is true that the age of majority in ancient times was often below 18 years. James, *supra.* At common law, moreover, minors were allowed to contract for necessities, including medical care, at least as early as *Dale* v. *Copping,* 1 Bulst. 39, 80 Eng. Rep. 743 (K.B. 1610).

Appellants have not cited one common law case from the last 500 years holding a physician liable for even a technical battery in performing a reasonably necessary medical service for a minor who had a reasonable degree of understanding and maturity.

Roe regarded the A.L.I. position and Uniform Abortion Act as significant.

The MODEL PENAL CODE art. 207, § 207.11, on "abortion and related offenses" did not require parental consent for minors in any of its drafts. Age ten was set for statutory rape in MODEL PENAL CODE § 213.1(1)(d) (Proposed Official Draft 1962), and age 16 (with the man 4 years older) for corruption or seduction. *Id.*, § 213.3(1)(a).

The UNIFORM ABORTION ACT *expressly* dispenses with any requirement of parental consent. Section 3 of the Act states:

> "Consent to an abortion must first be given by the woman or, if she is mentally incapable of giving consent, by a parent or guardian or by order of the [appropriate] court. *A woman is not incapable by reason of her minority of giving consent to an abortion under this Act.*" *Revised Uniform Abor-Act* § 3, in 9 UNIF. LAWS 9 (Cum. Pk. Pt. 1975) (Emphasis supplied).

The Commissioner's Comment states:

> "It is important to note that age of the pregnant female is not a necessary determinant of incapacity. A pregnant female in her minority may consent to an abortion given that other factors of incompetency or incapacity are not present." *Id.*

Accordingly, Appellees' constitutional position and understanding of *Roe* v *Wade* are precisely in line with that of the Commissioners on Uniform State Laws.

This Court in *Roe* also discussed the medical hazards of "illegal 'abortion mills' " and the relative safety of legal abortion in the hands of experienced physicians. 410 U.S. at 149-150. Without the protection of *Roe*,

however, minors will be driven into the dangerous and exploitive conditions of past decades.

Another focus of *Roe* v. *Wade* was the disastrous impact upon a woman's life and society as a whole caused by unwanted pregnancy. As the Court stated:

> "The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically or otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation." 410 U.S. at 153.

All or most of the factors above are aggravated in the case of adolescent pregnancy. The Record previously reviewed makes this clear.

Roe surveyed the lower court approaches to abortion generally and found: "the results are divided . . ." 410 U.S. at 155. With regard to parental consent, see *post*, the vote of the federal judiciary has been 30 to 4 for the position urged by Appellees. There is little division.

Finally, *Roe* concluded by stressing the need to allow leeway for physician and patient autonomy. The Court's summary held:

> "For the stage prior to approximately the end of the first trimester, the abortion decision and its

effectuation must be left to the medical judgment of the pregnant woman's attending physician." 410 U.S. at 164.

The opinion concluded with the admonition:

> "[T]he abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available." 410 U.S. at 166.

There are no narrowly drawn, compelling reasons for allowing state intervention into this process simply because of the chronological age of the patient. The right of privacy asserted by Appellees is the "right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* v. *Baird,* 405 U.S. at 453 (Emphasis in original). It is not the right of a parent to veto or control events which will affect a minor for a lifetime.

Finally, Appellees agree with the Chief Justice that:

> "the vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to health." *Roe* v. *Wade,* 410 U.S. 113, 208 (1973) (concurring opinion).

Doe v. *Bolton,* 410 U.S. 179 (1973), further supports Appellees. *Doe* struck down several provisions of the Model Penal Code-type abortion law from Georgia.[26]

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[26] After *Doe* v. *Bolton,* the Georgia legislature rewrote its abortion law. *See* GA. CODE ANN. § 26-1201. No. requirement of parental or spouse consent was included.

Doe reiterated the need to allow leeway for private action within the physician-patient relationship:

> "[T]he medical judgment may be exercised in the light of all factors, physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment." 410 U.S. at 192.

It is the physician's responsibility to consider the family situation and patient's age. When a patient strongly feels that parental involvement would be destructive, it is within the physician's role to agree. There is no duty on his part to conduct a private investigation or lengthy cross-examination of the patient. Experienced physicians in this field can and do make such judgments many times each day.[27]

Doe v. *Bolton* struck down requirements of third party consent by multiple physicians and a hospital committee. These were viewed as "basically redundant." 410 U.S. at 197. Here as in *Doe,* with third party vetoes,

> "[t]he woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited . . . ." 410 U.S. at 197

A similar analysis to that in *Doe* shows the impropriety of requiring parental consent for an abortion.

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[27] As *Doe* states: "If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment. . . . Required acquiescence by co-practitioners has no rational connection with a patients' needs and unduly infringes on the physician's right to practice." 410 U.S. at 199.

F. Lower Court Decisions on Parental Consent, Abortion, and Contraception:

The decision of the District Court exhaustively examined all opposing contentions in concluding that the double parental consent clause of the Massachusetts abortion law was unconstitutional. With the exception of the *Danforth*[28] case, the lower courts have unanimously invalidated parental consent to abortion statutes or regulations. *See, e.g., Poe* v. *Gerstein,* 517 F.2d 787, 789-794 (5th Cir. 1975); *Word* v. *Poelker,* 495 F.2d 1349, 1354 (8th Cir. 1974); *Jackson* v. *Guste,* — F. Supp. —, Civ. No. 74-2425, Sec. F (E. D. La., January 26, 1976) (three-judge court); *Doe* v. *Exon,* — F. Supp. —, Civ. No. CV 75-L-146 (D. Neb., October 8, 1975) (three-judge court); *Planned Parenthood* v. *Fitzpatrick,* 401 F. Supp. 554, 566-567 (E. D. Pa. 1975) (three-judge court); *Foe* v. *Vanderhoof,* 389 F. Supp. 947 (D. Colo. 1975); *Gary-Northwest Indiana Women's Services* v. *Bowen,* — F. Supp. —, Civ. No. H-74-289 (N.D. Ind., January 3, 1975) (three-judge court); *Wolfe* v. *Schroering,* 388 F. Supp. 631, 636-637 (W.D. Ky. 1974) (three-judge court); *Doe* v. *Rampton,* 366 F. Supp. 189 (D. Utah, 1973) (three-judge court); *State* v. *Koome,* 84 Wash. 2d 901, 530 P.2d 260 (1975); *cf. Ballard* v. *Anderson,* 4 Cal. 3d 873, 484 P.2d 1345, 95 Cal. Rptr. 1 (1971).

Among the lower court federal judges, the well-reasoned opinions are numerous. The vote has been 30 to 4. On few issues has the Federal judiciary spoken with such unity, clarity, and persuasiveness.

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[28] Planned Parenthood v. Danforth, 392 F. Supp. 1362 (E.D. Mo.) (three-judge court), *stay granted pending appeal,* 420 U.S. 918, *prob. juris, noted,* —— U.S. —— (1975) (Nos. 74-1151 & 74-1419).

The two judges in *Planned Parenthood* v. *Danforth,* 392 F. Supp. 1362 (E.D. Mo. 197[illegible], relied heavily on *Prince* v. *Massachusetts, supra, Ginsberg* v. *New York, supra,* and *Wisconsin* v. *Yoder, supra.* As Appellees have already shown, those cases in fact should be read to favor our position. They all recognize that minors have independent constitutional rights. They all rule on the side of protecting minors. They all involve a unity of interest between minor and parent, which is absent here. Not a word in *Prince, Ginsberg,* or *Yoder,* suggests that parents should have control over the fundamental privacy rights of minors.

Significantly, the *Danforth* majority refused to discuss any of the substantial contrary authority.

II. The Asserted State Justifications are Not Narrowly Drawn to Advance Legitimate, Compelling Interest

As Justice White suggested while concurring in *Wisconsin* v. *Yoder,* 406 U.S. 205, 237 (1972), this case involves "a delicate balancing of important but conflicting interests."

The decision in *Roe* v. *Wade,* 410 U.S. 113, 155 (1973), repeated the established principles which govern this appeal:

> "Where certain 'fundamental rights' are involved . . . [legislation] limiting these rights may be justified only by a 'compelling state interest' . . . [citations omitted]

Not only must the asserted state interest be legitimate and compelling, but such legislation must not be overbroad:

> "[E]nactments must be narrowly drawn to express only the legitimate state interests at stake."

The *Roe* test is one of due process. Related and overlapping equal protection issues are presented here too.[29] *See Eisenstadt* v. *Baird,* 405 U.S. 438 (1972). Similarly, the parental consent statute constitutes a legislative decree that no person under age 18 is competent to consent to an abortion. This contravenes the line of decisions which have struck down certain irrebutable presumptions as violative of due process. *See Cleveland Bd. of Educ.* v. *LaFleur,* 414 U.S. 632 (1974); *Vlandis* v. *Kline,* 412 U.S. 441 (1973).

The State interests relied on by Appellants and Intervenors overlap, and are very general in terms. Some are more properly characterized as interpretations of judicial doctrines or legal concepts which have already been discussed. Appelee's analysis of possible state interests is as follows:

Non Legitimate Interests—It is clear that those state interests restrained or limited in *Roe* v. *Wade* and *Doe* v. *Bolton,* such as protection of maternal health, any interest in fetal life and redundant multiple physician involvement are no more legitimately asserted on a parent's behalf than for the State. This was the rationale of *Coe* v. *Gerstein,* 376 F. Supp. 695 (S.D. Fla. 1973) (per curiam) (three-judge court), the first federal decision on this point.[30] That court stated:

[29] The *Verified Complaint* asks for a "declaratory judgment that the parental consent requirement violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. . . ." (A. 16).

[30] An appeal to this Court by the State was dismissed. 417 U.S. 279. Subsequently the Fifth Circuit affirmed on the merits in an exhaustively documented opinion. 517 F.2d 787 (5th Cir.), *appeal docketed,* 44 U.S.L.W. 3319 (U.S. Nov. 14, 1975) (No. 75-713).

> "We are persuaded that if the State cannot interfere to protect the fetus' interest in its potential life until the compelling point of viability is reached, neither can it interfere on behalf of husbands or parents to protect their interests in that potential life until the fetus becomes viable." 376 F. Supp. at 697.

This was the case with an asserted parental interest in a minor's health:

> "We are persuaded, also, that if the State cannot interfere to protect the pregnant woman's physical or mental health until approximately the end of the first trimester, neither can it interfere on behalf of husbands or parents to protect their interests in her health until that point is reached." 376 F. Supp. at 697.

Finally, the three-judge court concluded:

> "The failure of the Florida 'spousal or parental consent' requirement is that it gives to husbands and parents the authority to withhold consent for abortions for any reason or no reason at all. It allows a husband or parent to withhold consent out of concern for maternal health or the potential life of the fetus, in addition to other compelling reasons each may have for doing so . . . . [T]he State may not statutorily delegate to husbands and parents an authority the State does not possess." 376 F. Supp. at 698.

There is nothing in the Massachusetts abortion law to prevent a parent from taking into account his or her personal views on abortion, contrary to *Roe,* as a basis for withholding consent. Indeed, the State and Intervenor both openly assert a right to become involved in the medical and phychological evaluation of first tri-

mester abortion patients.[31] *Roe* forbids this. It has not been shown to be necessary. The physician and patient are the proper persons to determine in a given case whether parental involvement would be supportive or destructive, not the State. The details of group versus individual counseling, local versus general anesthesia, and Freudian versus Skinnerian psychology are not proper matters to resolve in first trimester abortion litigation. As with adults, the physician-patient relationship should be regulated as *Roe* and *Doe* suggested—by professional review and malpractice standards, not by the heavy hand of parental veto backed by the criminal law.

Family Unit—Appellees agree in principle that preservation of harmony in the family unit is legitimate, indeed a salutary government goal. However, the parental consent statute does not work that way in a substantial class of cases. A requirement of compulsory parental involvement or consent may be destructive to both parent and child. The statute is overbroad in omitting recognition of this fact.

Appellees have already set out the evidence, findings, and reasoning of the District Court on the family unit issue.

It would not preserve the family to have "kick[ed] [Mary Moe] out of the house. . . ." (Tr. 135). The "subclass of teenagers" (A. 357) discussed by defendants' expert Dr. Yerkes already live outside of traditional family units.

To subject a teenager, over her strenuous objection, to the physical and mental health hazards of an ado-

[31] *Brief for the Appellants,* pp. 14-15, 17-18, 28, 39, 43-45; *Brief for the Intervenors,* pp. 8, 10, 16, 20-23.

lescent term pregnancy discussed by Dr. Hodgson (A. 75) would hardly strengthen the family unit. There are some parents who would force an abortion on a minor,[32] and forced pregnancy must be considered a comparable evil.

As the Fifth Circuit stated in *Poe* v. *Gerstein,* 517 F. 2d. 787, 794 (5th Cir. 1975),

> "in the abortion context the requirement of parental permission is unlikely to achieve the state's aim of insuring the preservation of the family. If a minor's pregnancy has fractured the family structure, imposition of a parental prohibition of abortion cannot reasonably be expected to restore the family's viability as a unit."

To permit the minor's abortion, moreover, supports her later formation of a more stable family unit in the next generation. At that time she may voluntarily desire to form such ties and/or become a *willing* parent.

Parental Control—Appellees, as the Fifth Circuit, "have some difficulty accepting parental control as a compelling state interest in the context of this statute." *Poe* v. *Gerstein,* 517 F.2d 787, 793 (5th Cir. 1975). In the case of a pregnant minor, to some degree "whatever control the parent once had over the minor has diminished if not evaporated entirely." 517 F.2d at 794.

Parental control has connotations of authoritarianism which are alien to our system and institutions. Such control *per se* implies a right in the parents to

[32] *In re Smith,* 16 Md. App. 209, 295 A.2d 238 (Ct. Spec. App. 1972), is the report of an emergency appellate court session to prevent a sheriff from taking a young woman to a hospital for a forced abortion insisted upon by her mother.

force an abortion, as was attempted *In re Smith, supra.*

The expert testimony, again, strongly suggests that parental control can be badly abused in a substantial class of cases.

Finally, under the new minor's consent law, MASS. GEN. LAWS c. 112, § 12H(4), a pregnant minor can obtain any form of medical treatment without parental consent except abortion. With this the case, she is penalized and forced to notify her parents only if abortion is her chosen course of action. No uniform rationale of parental control can support such invidious discrimination.

Protection of the Minor—Appellants appear to seriously assert that the double parental consent requirement is designed to protect the best interests and privacy rights of minors who might otherwise be improvident. This protection is not necessary in the case of a minor who may give an understanding and informed consent. As the District Court found,

> "a substantial number of females under the age of 18 are capable of forming a valid consent." 393 F. Supp. at 855.

Nothing in the statute, legislative history, or the nature of parental consent would necessarily improve the quality of such a minor's understanding. The statute has no exception for mature minors, or other minors with immature, emotionally upset parents. As the Fifth Circuit stated,

> "the ability of the parent to improve the 'quality' of the abortion decision is questionable, for the ameliorative qualities of a third person's wisdom and experience in this decision are uncertain." 517 F.2d at 793.

Further, that court observed, "numerous cases have noted parents refusing operations on their children for nonsensical or even punitive reasons." 517 F.2d at 793.

* * *

In sum, of the many possible interests asserted by Appellants and Intervenors, none is necessary to the achievement of any narrowly drawn compelling governmental interest.[33]

III. The District Court Correctly Refused to Seek a State Court Ruling on the Meaning of Sec. 12 P

The abstention or "*Pullman* doctrine" recognizes the principle ". . . that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts

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[33] The legal commentary on this issue has been strongly supportive of Appellees' position. *See* Zuckerman, *Abortion and Contraception: A Minor's Constitutional Right to Privacy*, 4 FAM. PLANNING/POPULATION REP. 114 (Dec. 1975); Lee & Paxman, *Pregnancy and Abortion in Adolescence: A Comparative Legal Survey and Proposals for Reform*, 6 COLUM. HUMAN RIGHTS L. REV. 307 (1974-1975); Paul, *Legal Rights of Minors to Sex-Related Medical Care*, 6 COLUM. HUMAN RIGHTS L. REV. 357 (1974-1975); Pilpel & Zuckerman, *Abortion and the Rights of Minors*, 23 CASE. W.RES. L. REV. 779 (1972); Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001 (1975); Note, *Implications of the Abortion Decisions: Post Roe and Doe Litigation and Legislation*, 74 COLUM. L. REV. 237 (1974); Note, *Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305 (Feb. 1974); Note, *Right of Husband or a Minor's Parent to Participate in the Abortion Decision*, 28 U. MIAMI L. REV. 251 (Fall 1973). Comment, 9 AKR. L. REV. 158 (Summer 1975); Comment, 9 SUFF. U.L. REV. 841 (Spr. 1975).

have been afforded a reasonable opportunity to pass upon them." *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 176 (1959); *see Railroad Com.* v. *Pullman Co.*, 312 U.S. 496 (1941); *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964); *Harman* v. *Forssenius*, 380 U.S. 528 (1965). This doctrine, however, ". . . is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers." *Baggett* v. *Bullitt*, 377 U.S. 360, 375 (1964); *see Lehman Brothers* v. *Schein*, 416 U.S. 386 (1974). Indeed, abstention requiring the postponement of a decision upon the constitutionality of a state statute is proper only under ". . . . special circumstances (citations omitted) justifying 'the delay and expense to which application of the abstention doctrine inevitably gives rise.' (citations omitted)." *Lake Carriers' Association* v. *MacMullan*, 406 U.S. 498, 509 (1972).

Such "special circumstances" exist "[i]f the state courts would be likely to construe the statute in a fashion that would avoid the need for a federal constitutional ruling or otherwise significantly modify the federal claim . . . (citations omitted)." *Harris County Commissioners Court* v. *Moore*, 420 U.S. 77, 84 (1975). In such a situation, abstention preserves comity and avoids premature constitutional adjudication. *See Harman* v. *Forssenius, supra; Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971). "Where, on the other hand, it cannot be fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constituional adjudication, abstention would amount to shirking the solemn responsibility of the federal courts to 'guard, enforce, and

protect every right granted or secured by the Constitution of the United States.' (citation omitted)." *Kusper* v. *Pontikes*, 414 U.S. 51, 55 (1973); *see Wisconsin* v. *Constantineau, supra; Fornais* v. *Fidge Tool Co.*, 400 U.S. 41 (1970); *Zwickler* v. *Koota*, 389 U.S. 241 (1967).

Whatever construction the Massachusetts courts place upon Sec 12P, it would still be violative of the privacy rights of the class of females represented by Mary Moe. By its terms, the statute gives to parents of minors an unbridled veto, subject to the approval of a judge of the Superior Court, over their daughter's constitutionally protected decision "to bear or beget a child." *Eisenstadt* v. *Baird, supra* at 453. Once one of the parents disapproves for any reason at all, the young woman has the burden of proving to the judge that "good cause" exists for the performance of the abortion. The statute provides no standards to guide her or the judge in his difficult task. He must choose between the privacy rights of the young woman and the rights of the parents as established by the statute.

Even if "good cause" in Sec. 12P were construed to mean "reasons adequate to persuade a judge, on the basis of traditional equity notions, to authorize the surgery, *Brief for the Appellants*, p. 39, this would not negate the deference the judge must pay to the views of her parents. The hearing would still be a major obstacle to overcome in the assertion of her fundamental rights. It would also provide some delay in her decision making process, thereby increasing the medical risks of terminating her pregnancy. *Roe* v. *Wade, supra* at 150.

The nature of the "good cause" for an abortion was determined by *Roe* v. *Wade* and *Doe* v. *Bolton* to be a

matter between physician and patient, not to be litigated endlessly.

Adoption of Appellant's view would generate another mass of litigation under 42 U.S.C. § 1983 in the federal courts and MASS GEN. LAWS, c. 112, § 12P(1), in state courts, with minors set against their parents in judicial contests over the scope of federal privacy rights and interpretation of the fluid term "good cause." A few calculations would quickly show that hundreds of such lawsuits would be filed annually in Massachusetts alone: perhaps thousands nationally if similar legislation were to be adopted.

IV. The District Court, in Its Discretion, Correctly Determined that a Guardian Ad Litem was Unnecessary to Protect the Interests of Mary Moe

Appellants and Intervenors have raised two procedural issues: (1) whether a guardian *ad litem* was necessary for Mary Moe, and (2) whether the parents of Mary Moe should have been joined as necessary parties.

For three reasons it is unnecessary to resolve either issue.

First, Mary Moe was not an indispensable party to the litigation. The District Court correctly found that Dr. Zupnick and Parents Aid Society, Inc., had full standing to sue. This rendered the standing and representation of other parties essentially academic.

Second, the statute was challenged on its face, not as applied to Mary Moe. The facts pertaining to her had necessary bearing solely on the standing and class action questions. With others in the case, the District Court could reach the merits.

Third, in view of the result on the merits, which recognized her constitutional rights, the presence or absence of a guardian became immaterial. Her rights were vindicated when she obtained the abortion. There was nothing more a guardian *ad litem* could do for her.

However, since the issue was not excluded in the grant of jurisdiction, and has been briefed, Appellees will respond.

Whether or not a federal court should appoint a guardian *ad litem* to protect the interests of a minor is a sensitive decision necessarily involving a variety of factors arising from the child's relationship with the world of adults. This fact is recognized in FED. R. CIV. P. 17(c) [34] which gives the court broad discretion in deciding the matter. *Jacobs* v. *Board of School Commissioners,* 490 F.2d 601, 604 (7th Cir. 1973), *vacated on other grounds,* 420 U.S. 128 (1975); *Travelers Indemnity Co.* v. *Bengtston,* 231 F.2d 263, 266 (5th Cir. 1956); *Westcott* v. *United States Fidelity and Guaranty Co.,* 158 F.2d 20 (4th Cir. 1946); *Foe* v. *Vanderhoof, supra,* 389 F. Supp. at 957.

> "Rule 17(c) does not make the appointment of a guardian ad litem mandatory. If the court feels that the infant's interests are otherwise adequately represented and protected a guardian ad litem need not be appointed. (Citation omitted)." *Roberts* v. *Ohio Casualty Insurance Co.,* 256 F.2d 35, 39 (5th Cir. 1958); *see* 6 WRIGHT & MILLER,

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[34] The Rule states in part:

"The Court shall appoint a guardian *ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person. Fed. R. Civ. P. 17(c)."

FEDERAL PRACTICE AND PROCEDURE, § 1570 at 775 (1971).

Most courts have taken a practical approach in deciding this question. *Cf. In re Adoption of a Minor,* 120 F.2d 720 (D.C. Cir. 1941); *Till* v. *Hartford Accident and Indemnity Co.,* 124 F.2d 405 (10th Cir. 1941); *Rutland* v. *Sikes,* 203 F. Supp. 277 (E.D.S.C.), *aff'd on other grounds,* 311 F.2d 538 (4th Cir. 1962), *cert. denied,* 374 U.S. 830 (1963); *Foe* v. *Vanderhoof, supra.* Where the minor's interests have been or would be adequately protected by an able and experienced attorney,[35] other parties in the suit,[36] or the court itself,[37] the appointment of a guardian *ad litem* has been deemed unnecessary. Other factors which have mitigated against the appointment of a guardian *ad litem* have included the intelligence, understanding, and maturity of the child,[38] the cost of such appointment,[39] and the existence of constitutional rather than monetary issues in the case.[40]

Significantly, Mary Moe had sought out and recieved the supportive guidance of experienced counselors at the Parents Aid Society. As a result, she understood the nature both or her pregnancy and of the lawsuit she had initiated. Her attorney, having previously participated in challenges to parental consent laws in other

[35] *Jacobs* v. *Board of School Commissioners, supra; in re Adoption of a Minor, supra; Foe* v. *Vanderhoof, supra; Rutland* v. *Sikes, supra.*

[36] *in re Adoption of a Minor, supra.*

[37] *Id.; Foe* v. *Vanderhoof, supra.*

[38] *Foe* v. *Vanderhoof, supra.*

[39] *United States* v. *Noble,* 269 F. Supp. 814 (E.D.N.Y. 1967).

[40] *Jacobs* v. *Board of School Commissioners, supra; Rotzenburg* v. *Neenah Joint School District,* 62 F. R.D. 340 (E.D.Wis. 1974).

jurisdictions, was sensitive to the inherent medical and psychological issues of the case. Although he also represented other plaintiffs who arguably stood to indirectly gain financially from a successful outcome,[41] there is no indication whatsoever that Mary Moe's interests in the case were at all compromised. In point of fact, the interests of all plaintiffs in challenging the statute were coexistensive throughout the trial. Furthermore, "... to the extent that there may be thought to [have been] any conflicting interests, [Mary Moe was protected] by the action of competent counsel for the intervening parent." 393 F. Supp. at 850 n.5. The District Court's findings, made after an extensive *in camera* interview with Mary Moe, are reflective of these facts.

The District Court also noted the irony of Appellants' position on this issue. As opposed to the guidance and support given to Mary Moe in the present case, "... the statute in question, which offers the minor a superior court hearing if her parents refuse their consent to an abortion, provides that the court need not appoint a guardian although in such instance *no one at all may be representing her.*" 393 F. Supp. 850 n.5. (Emphasis added).

Appellants have cited the cases of *Roberts* v. *Ohio Casualty Insurance Co., supra* at 39, and *Noe* v. *True,* 507 F.2d 9, 11-12 (6th Cir. 1974), as being supportive

[41] Respondent Parents Aid Society is a non-profit organization (393 F. Supp. at 851, A-10). Consequently, it did not care to benefit financially from a favorable decision. Moreover, the fact that Mr. Baird had never drawn a salary for his work at Parents Aid Society (393 F. Supp. at 851, A. 259) and that Dr. Zupnick frequently performs abortions for free (A. 220, 222) is indicative of their lack of monetary motivation in pursuing this action.

of their claim. Yet the lower court in neither case considered or ruled upon the appointment of a guardian *ad litem*. In contrast, the District Court below made a reasoned ruling based upon its perception of the pertinent factors. At a minimum, their determination was not an abuse of discretion.

V. Joinder of the Parents of Mary Moe as Defendants was Unnecessary

A. The District Court Correctly Refused to Join the Parents of Mary Moe as Defendants Because Neither Had a Cognizable, Independent Interest in the Case:

Fed. R. Civ. P. 19(a) provides in part:

> "(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . . (2) he claims an interest relating to the subject of the action and is so situated that the deposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest. . . ."

Appellees concede that the parents of Mary Moe, as citizens of Massachusetts, would have been subject to service of process in this action. Moreover, their joinder would not have deprived the court of subject matter jurisdiction. They submit, however, that neither parent possessed a cognizable, personal interest, independent of their daughter, in the subject matter of the case which would have been prejudiced by the case's disposition in his or her absence. See, section I, *supra;* 393 F. Supp. at 856-857. Consequently, their

joinder was "unnecessary." *See, e.g., International Union of Operating Engineers, Local 103, AFL-CIO* v. *Imscher & Sons, Inc.,* 63 F.R.D. 394, 398 (N.D. Ind. 1973).

B. Mary Moe's Parents Were Adequately Represented in This Class Suit by Intervenor-Appellant:

This case was brought and certified as a class action. 393 F. Supp. at 849-850. Appellees sought a judgment declaring Sec. 12P unconstitutional and an injunction prohibiting its enforcement and implementation. (A. 14, 15). It was, therefore, a class action maintained under Fed. R. Civ. P. 23 (b)(2). In such actions, notice to the absent members of the class is not required. *Childs* v. *United States Board of Parole,* 511 F.2d 1270, 1276 (D.C. Cir. 1974); *Watson* v. *Branch County Bank,* 380 F. Supp. 945, 959-960 (W.D. Mich. 1974).

By definition, a class action is brought to allow the court to adjudicate the rights of a class of persons whose joinder in the action is impractical. Fed. R. Civ. P. 23(a); *see Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356 (1921). Fed. R. Civ. P. 19(d) [42] recognizes the superiority of the class action to the joinder procedure when there are numerous "interested" parties. *See, e.g.,* 3A Moore, Federal Practice, ¶ 19.21, 2617-2618 (1974).

Since this action was applicable to a large number of Massachusetts residents, Mary Moe was allowed to

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[42] Fed. R. Civ. P. 19(d) provides:

"This rule is subject to the provisions of Rule 23."

represent "... a substantial class of unmarried minors in Massachuetts who have adequate capacity to give a valid and informed consent, and who do not wish to involve their parents." 393 F. Supp. at 850. Likewise, Mrs. Hunerwadel, the mother of three teenaged daughters, was allowed to intervene and represent the "... parents of all nubile minor females in Massachusetts who may, in their opinion unwisely or improperly, wish to have an abortion without informing them." 393 F. Supp. at 850.

Appellees submit that Mary Moe's parents fell precisely within the class of parents represented by Mrs. Hunerwadel. Even assuming *arguendo* that they possessed cognizable and independent rights in this matter, there is no basis to assume that their rights were distinguishable from those of their fellow class members. Nowhere has it been suggested that Mrs. Hunerwadel failed to adequately represent this class. Consequently, she also adequately represented the alleged rights of Mary Moe's parents.

Appellees feel obliged to point out two more facts in defense of the rationality of the District Court's decision. First, if the parents of Mary Moe should have been joined here, by the same logic the daughters of Mrs. Hunerwadel should also have been joined. Like Mary Moe, Mrs. Hunerwadel was allowed to testify at the trial. (A. 360-372). Yet the Appellees did not have the benefit of Mrs. Hunerwadel's daughters to impeach her testimony.

The Court wisely dismissed three other Mary Moes and the remaining Intervenor-parents from the case. 393 F. Supp. at 849, n. 1,850. Had this not been done, the logic of the Appellants would have required the joinder of dozens of superfluous parties.

The second point that must be brought out is the fact that Mary Moe would never have participated in the case had her parents been notified. As the District Court noted, her desire to conceal her pregnancy "... precisely fits standard concepts of the right of privacy." 393 F. Supp. at 853. By honoring Mary Moe's wishes and not informing or joining her parents in the case, the District Court acted with restraint and sensitivity.

CONCLUSION

For the reasons set out in this brief, the Court should affirm the judgment of the District Court and award costs to Appellees.

Respectfully submitted,

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